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Title: D. Grant Peacock, Petitioner
v.
Jack L. Thomas

Docketed:
March 1, 1995

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Freeman,David L.

Counsel for respondent: Gilreath,James R., Few,J. Kendall

Entry	Date	Note	Proceedings and Orders
1	Mar 1 1995	G	Petition for writ of certiorari filed.
3	Mar 28 1995		Order extending time to file response to petition until May 1, 1995.
5	May 1 1995		Brief of respondent Jack L. Thomas in opposition filed.
4	May 3 1995		DISTRIBUTED. May 19, 1995 (Page 1)
6	May 22 1995		Petition GRANTED.
			**********
8	Jun 2 1995		Order extending time to file brief of petitioner on the merits until July 21, 1995.
9	Jun 2 1995		DEFERRED APPENDIX.
10	Jul 20 1995		Joint appendix filed.
11	Jul 20 1995		Brief of petitioner D. Grant Peacock filed.
12	Jul 21 1995		Brief amicus curiae of National Association of Real Estate Investment Managers filed.
14	Aug 2 1995		Order extending time to file brief of respondent on the merits until September 6, 1995.
27	Aug 4 1995	N	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
16	Aug 29 1995		Record filed.
		*	Original record proceedings U.S. District Court for the District of South Carolina(BOX-CONTAINS SEALED ENVELOPE)
17	Aug 31 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Fourth Circuit.
18	Sep 5 1995		SET FOR ARGUMENT MONDAY, NOVEMBER 6, 1995.(2ND CASE).
19	Sep 6 1995		Brief amicus curiae of Bricklayers & Trowel Trades International Pension Fund filed.
20	Sep 6 1995		Brief amicus curiae of National Coordinating Committee for Multiemployer Plans filed.
21	Sep 6 1995		Brief amici curiae of American Association of Retired Persons, et al. filed.
22	Sep 6 1995		Brief amicus curiae of AFL-CIO filed.
23	Sep 6 1995		Brief amici curiae of Central States, et al. filed.
24	Sep 6 1995		Brief amicus curiae of United States filed.
25	Sep 6 1995		Brief of respondent Jack L. Thomas filed.
26	Sep 8 1995		CIRCULATED.
29	Oct 6 1995	X	Reply brief of petitioner filed.
28	Oct 10 1995		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
30	Nov 6 1995		ARGUED.

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No. ____

In The Supreme Court of the United States

October Term, 1994

Jack L. Thomas,
Respondent,

v.

D. Grant Peacock,
Petitioner.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, consistent with Article III of the Constitution and the decision of this Court in *H.C. Cook Co. v. Beecher*, 217 U.S. 497, 30 S. Ct. 601 (1910), a federal court may automatically assert "ancillary" jurisdiction over a separate lawsuit, involving separate facts, filed for the purpose of collecting a prior federal judgment from a party other than the judgment debtor.

2. Whether, under this Court's holdings in *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), and *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 108 S. Ct. 2182 (1988), a court may derive from ERISA, and impose on a nonfiduciary, a substantive ERISA remedy for the collection of a judgment entered pursuant to ERISA in a prior lawsuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. ——

JACK L. THOMAS,
Respondent,

v.

D. GRANT PEACOCK,
Petitioner.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

D. Grant Peacock respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, at 1a, is reported at 39 F.3d 493. The opinions of the district court are unreported. App., *infra*, at 30a, 54a.

JURISDICTION

The court of appeals entered its judgment on November 4, 1994. Petitioner timely sought rehearing by the Fourth Circuit, and that request was denied on December

2, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 502(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a), enumerates the private causes of action available under ERISA. Its text is set forth in the Appendix, *infra*, at 71a.

Section 502(e)(2) of ERISA, 29 U.S.C. § 1132 (e)(2), ERISA's nationwide service of process provision, provides:

> "Where an action under this title is brought in a district court of the United States, . . . process may be served in any other district where a defendant resides or may be found."

28 U.S.C. § 1367 codifies the law of ancillary and pendent federal court jurisdiction. Its text is set forth in the Appendix, *infra*, at 73a.

STATEMENT

A. Overview.

This is a collection action, filed in federal court against Petitioner for the purpose of collecting a judgment obtained against a corporation, Tru-Tech, Inc., in a previous lawsuit in federal court. Petitioner Grant Peacock asserted that the action should be dismissed, among other reasons, because the district court lacked jurisdiction over the dispute. The opinion below observed that there is no diversity jurisdiction here, and that the only potential basis for federal jurisdiction is that the action seeks to enforce a prior federal court judgment.

The Fourth Circuit held that this jurisdictional basis is sufficient—that a federal court has "ancillary jurisdiction" over a separate lawsuit brought for the purpose of collecting a prior federal judgment from a person other

than the judgment debtor from the prior suit. In this holding, the Fourth Circuit joined similar rulings by the Third and Seventh Circuits. These circuit court decisions have treated as a nullity a controlling decision of this Court, and are also in disagreement with decisions from the Fifth and Tenth Circuits, among others.

The original judgment entered against Tru-Tech was based on its obligations as a fiduciary to an ERISA plan, and was obtained in an action under ERISA. Petitioner Peacock was not a fiduciary of the plan in question. The Fourth Circuit nevertheless held Petitioner liable for the judgment against Tru-Tech on a theory of piercing Tru-Tech's corporate veil. By thus imposing liability on a nonfiduciary, and finding in ERISA an extrastatutory mechanism for the enforcement of ERISA judgments, the decision below came into conflict with this Court's recent ERISA jurisprudence.

B. The Prior Lawsuit.

The scene for this case cannot be set without brief reference to the prior related case, *Thomas v. Tru-Tech, Inc.* ("*Tru-Tech*"), the ERISA case in which liability was imposed upon Tru-Tech as a plan fiduciary, but Petitioner Grant Peacock was absolved of liability and expressly held not to be a fiduciary. The instant case is essentially an effort by Respondent Thomas to find a solvent defendant to pay the judgment rendered in *Tru-Tech*.

On the question of Petitioner Peacock's fiduciary status, the Fourth Circuit upheld the district court's conclusion that he was not:

> [T]he district court held that Peacock acted solely in his capacity as Chairman of the Board of Tru-Tech, not as a fiduciary of the Plan. Indeed, the record reveals that Tru-Tech's Board of Directors resolved in a meeting on October 11, 1984, to retain the ten-year cliff vesting schedule. Conceding this, *Thomas insists*

> *that Peacock, as the principal investor, dominated the Board and had de facto power to make these decisions concerning the Plan. But this influence has scant evidentiary support and does not contradict the finding that these decisions were made by the Board, not Peacock acting unilaterally.*

Thomas v. Tru-Tech, Inc., 900 F.2d 256 (table only), 1990 WL 48865 at **3 (4th Cir. Apr. 3, 1990) (unpublished; emphasis added).

C. Proceedings Below in the Instant Case.

1. Before the District Court.

Thus, at the conclusion of *Tru-Tech*, Petitioner Peacock was no longer within the jurisdiction of the federal court. Respondent Thomas filed the instant proceeding against Petitioner—an entirely new lawsuit, with a new caption, a new file number, and entirely different factual allegations—to force Petitioner to pay the judgment entered against Tru-Tech. The Complaint attempted this through a cause of action styled "Piercing the Corporate Veil Under ERISA and Applicable Federal Law." The issue for trial was whether Petitioner Peacock, in his dealings with Tru-Tech *after* the entry of judgment, engaged in activities that improperly removed assets from Tru-Tech.

The district court rejected Petitioner's argument that ERISA does not provide such an independent cause of action as "piercing the corporate veil" (and thus, that ERISA cannot be relied on either for subject matter jurisdiction or for personal jurisdiction by virtue of ERISA's nationwide service of process). App. *infra*, at 50a, 65a.

Instead, the district court accepted the theory that ERISA provides a cause of action for piercing the corporate veil of an ERISA fiduciary to reach its non-fiduciary shareholders. App., *infra*, at 43a-50a. It also held that the corporate veil should not be accorded great significance in an ERISA case, given the "broad, remedial scope" of ERISA. App., *infra*, at 50a. "The congressional intent of ERISA," the district court concluded, "is to hold employers responsible for pension benefits, so that when the corporate form poses a bar to liability, concerns for corporate separateness are secondary to the mandate of ERISA." App., *infra*, at 52a. On this basis, the district court imposed personal liability on Petitioner Peacock for the prior judgment against Tru-Tech.

2. In the Court of Appeals.

The Fourth Circuit affirmed, but not on the ERISA-specific grounds of the district court. Instead, the court of appeals held that an action to pierce the corporate veil of a judgment debtor falls within a federal court's "ancillary jurisdiction"—even if the action is commenced as an entirely separate lawsuit. This conclusion is in direct conflict with an opinion of this Court, as well as recent decisions in several circuits, regarding the extent of a federal court's ancillary jurisdiction.

On the issue of federal jurisdiction, the Fourth Circuit did note that there was no diversity jurisdiction in this case, and "that there is no basis for federal question jurisdiction other than the fact that the suit seeks to enforce a judgment obtained pursuant to ERISA." 39 F.3d at 499 n.6, App., *infra*, at 11a. This one fact was held sufficient, however; the court affirmed, on the basis that this separate suit to pierce Tru-Tech's corporate veil and impose liability on Petitioner was "ancillary" to the federal district court's jurisdiction over the previous lawsuit, *Tru-Tech*. In so holding, the Fourth Circuit relied primarily on this Court's 1867 opinion in *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166 (1867). 39 F.3d at 500, App., *infra*, at 13a. *Riggs* does not deal directly with the issue presented here, but states the proposition that some "proc-

ess subsequent to judgment" is a part of the federal court's power. 73 U.S. (6 Wall.) at 187.[1]

The court of appeals acknowledged to varying degrees three cases that are in direct conflict with its application of ancillary jurisdiction. In *H.C. Cook Co. v. Beecher*, 217 U.S. 497, 30 S. Ct. 601 (1910), which the Fourth Circuit sought to distinguish, this Court held squarely that a case such as this one does not fall within a federal court's ancillary jurisdiction. 39 F.3d at 500, App., *infra*, at 13a. The Fourth Circuit also made passing mention of, but did not analyze, decisions in two other circuits that reach the opposite result from the instant case. 39 F.3d at 501, App., *infra*, at 15a; *see Sandlin v. Corporate Interiors Inc.*, 972 F.2d 1212, 1217 (10th Cir. 1992); *Berry v. McLemore*, 795 F.2d 452, 455 (5th Cir. 1986).

The Fourth Circuit's stated test for the propriety of exercising ancillary jurisdiction was whether the subsequent action is "truly independent" of the prior action. The court gave no weight to the fact that the veil-piercing action is entirely separate from the prior lawsuit on which federal jurisdiction is dependent:

> Without defining the precise contours of when a subsequent litigation is "independent" of a former litigation and judgment, we believe that [Respondent] Thomas' attempt to pierce the corporate veil is not "independent" of the initial litigation herein. As noted above, an attempt to pierce the corporate veil is necessarily subsidiary to some primary cause of action. *That Thomas opted to file a separate action to pierce Tru-Tech's corporate veil is irrelevant*: the court's subject matter jurisdiction does not turn on whether Thomas pursued the procedurally proper route. . . . [*T*]*his is, at bottom, a proceeding the goal of which is to collect the judgment earlier obtained by the plaintiff class. There is, in short, simply no practical reason to treat this litigation as separate from the initial litigation.*

39 F.3d at 501-02, App., *infra*, at 16a (citations and footnotes omitted; emphasis added). In other words, the court below concluded that the instant action was not "independent," and that ancillary jurisdiction was therefore proper, for the simple reason that the goal of this action "is to collect the judgment" from the prior action.

After concluding that federal jurisdiction was proper, the Fourth Circuit proceeded to fashion an ERISA remedy for piercing the corporate veil. Having noted that veil piercing is "substantive" law, 39 F.3d at 499, App., *infra*, at 12a, the court held that "ERISA preempts any state law of veil-piercing," 39 F.3d at 503, App., *infra*, at 20a. It expressly rejected Petitioner's argument that *Mackey* means there is no *ERISA* remedy for judgment enforcement, *id.*, (although there may be one under state law) and thus that ERISA's nationwide service of process provision, 29 U.S.C. § 1132(e)(2), could not be used to reach Petitioner. The prior judgment was accordingly imposed on Petitioner under the auspices of ERISA. The court "adopt[ed] the liberal veil-piercing standard enunciated by the First Circuit in *Alman* [*v. Danin*, 801 F.2d 1 (1st Cir. 1986)] for use in ERISA actions." 39 F.3d at 504, App., *infra*, at 23a. It quoted with approval a long passage from *Alman*, which states among other things that ERISA "cannot be said to attach great weight to corporate form." 39 F.3d at 504, App., *infra*, at 21a.

[1] The full text quoted by the Fourth Circuit states:

> It is black letter law that
>
> the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. . . . Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.

REASONS FOR GRANTING THE PETITION

I. SUMMARY.

In the broadest terms, there are two reasons for the Court to take this case. First, it is in direct conflict with this Court's decisions in *Beecher* and in *Kokkonen v. Guardian Life Insurance Co.*, 114 S. Ct. 1673 (1994) over the scope of federal ancillary jurisdiction. It also broadens an existing conflict among a number of circuits over the same point; notably, some of the circuit courts agreeing with the Fourth Circuit have reached their decisions by expressly declining to follow *Beecher*. The issues presented are important ones; the decision below has the potential to expand federal court jurisdiction dramatically in all areas. It would open the federal courts to any separate lawsuit filed for the purpose of collecting a prior federal judgment. The issues giving rise to these conflicts are cleanly presented here, and the Court should resolve this important question of federal jurisdiction and reaffirm the vitality of *Beecher*.

Second, the decision below reaches a result that is contrary to this Court's decisions in two ERISA cases, *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), and *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 108 S. Ct. 2182 (1988). Taken together, these cases make it clear that ERISA does not provide a specific remedy for the collection of ERISA judgments, and that ERISA is in general a "comprehensive and reticulated statute," *Mertens*, 113 S. Ct. at 2066, and accordingly that theories of liability not included in the statute should not be created by the judiciary, 113 S. Ct. at 2071-72. Yet the decision below does precisely what these decisions forbid. It derives from ERISA a means for the enforcement of an ERISA judgment on a theory of recovery not spelled out in ERISA, against a person not identified by ERISA as liable. (Indeed, against a person previously held *not* to be liable under ERISA.) Because

personal jurisdiction could be had *only* pursuant to ERISA's nationwide service of process provision, 29 U.S.C. § 1132(e)(2), treatment of the remedy as arising under ERISA was indispensable to the result below. This result contributes to the existing confusion among the circuit courts of the respect to be paid to the corporate form in ERISA cases. The Court should bring this matter back in line with its precedents and the statutory balance struck by Congress.

II. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISIONS IN *BEECHER* AND *KOKKONEN* AND WITH DECISIONS OF SEVERAL OTHER CIRCUITS. IT HAS THE POTENTIAL TO GREATLY EXPAND THE SCOPE OF FEDERAL JURISDICTION.

The fundamental question of federal jurisdiction presented here is the availability of ancillary jurisdiction over a separate lawsuit, involving new facts, filed to collect a prior federal court judgment from a party other than the judgment debtor.[2] Review is appropriate because there is a substantial split of authority on this point, which has called into question one of this Court's precedents.

The lower court cases that have held that ancillary jurisdiction does not exist in such a circumstance, or which have enunciated principles plainly precluding such an action, include *Sandlin*, 972 F.2d 1212, 1217 (10th Cir. 1992); *Berry*, 795 F.2d 452, 455 (5th Cir. 1986); *Sederquist v. Court*, 861 F.2d 554, 557-58 (9th Cir. 1988); *Redding Ford v. California State Board of Equalization*, 722 F.2d 496, 498 (9th Cir. 1983); *Fidelity & Casualty Company v. Reserve Ins. Co.*, 596 F.2d 914, 918 (9th

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[2] There is no alternative basis for jurisdiction here. As the court below noted, it is "undisputed that there is no diversity of citizenship in this action, and that there is no basis for federal question jurisdiction other than the fact that the suit seeks to enforce a judgment obtained pursuant to ERISA." 39 F.3d at 499 n.6; App., *infra*, at 11a n.6.

Cir. 1979); *National Westminster Bank U.S.A. v. Cheng*, 751 F. Supp. 1158, 1160 (S.D.N.Y. 1990) (relying on *Manway Constr. Co. v. Housing Auth. of the City of Hartford*, 711 F.2d 501, 504 (2d Cir. 1983)).

Other circuits have disagreed, holding or implying that ancillary jurisdiction does exist in such a case. *Argento v. Village of Melrose Park*, 838 F.2d 1483, 1487-90 (7th Cir. 1988) (followed in *Sullivan v. Hochfelder*, 834 F. Supp. 1036, 1038 (N.D. Ill. 1993), albeit with mention of the problem of exercising ancillary jurisdiction in a separate action); *Skevofilax v. Quigley*, 810 F.2d 378, 383-85 (3d Cir. 1987) (*en banc*); *Blackburn Truck Lines v. Francis*, 723 F.2d 730, 732 (9th Cir. 1984).

The appropriateness of review is heightened because the decision below is in direct conflict with this Court's decision in *H.C. Cook Co. v. Beecher*, 217 U.S. 497, 30 S. Ct. 601 (1910). Moreover, two of the circuits agreeing with the Fourth Circuit have directly questioned the continuing vitality of *Beecher*. Before describing the circuit split, we therefore turn to *Beecher*, and to this Court's recent decision in *Kokkonen*, which also directs a different result from the one reached below.

A. This Court Should Grant Certiorari to Reaffirm the Validity of its Controlling Opinion in *Beecher*, Which Has Come into Question.

In *Beecher*, a judgment creditor brought an action to impose liability for a prior patent judgment on the directors of the corporate judgment debtor. The creditor accused the directors of taking actions with the purpose and effect of rendering the company insolvent in the event of a judgment against it. In his opinion for the Court, Justice Holmes was careful to emphasize that the second action did not deal with the patent (just as the instant case does not contain any allegations regarding the ERISA plan) but had to do only with the existence of the judgment.

Accordingly, the Court ruled that the attempt to impose liability on the directors was "of course" not "ancillary to the judgment in the former suit." 217 U.S. 497, 30 S. Ct. at 602.

Beecher is plainly controlling here. The allegations and issues are the same below and in *Beecher*. The court below sought to distinguish *Beecher* on the timing of the alleged wrongs by the individual defendants in the two cases, but the net effect of this is to emphasize that Petitioner Peacock's asserted wrongdoing was entirely divorced in time from the ERISA wrong for which Tru-Tech was held liable. 39 F.3d at 501, App., *infra*, at 15a. This break in time highlights the absence of the "common nucleus of operative fact" between *Tru-Tech* and the instant case that would make the two part of the same constitutional "case or controversy."[3] *See* 39 F.3d at 503 n.14, App., *infra*, at 19a n.14.

Two circuit courts that have reached conclusions similar to the one below have said that *Beecher* should be treated as a nullity. In *Argento*, a divided panel of the Seventh Circuit approved an exercise of ancillary jurisdiction over a separate lawsuit to impose liability on parties held not liable in the prior suit. They declined to follow *Beecher*: "That case, decided over 75 years

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[3] As we discuss *infra* in describing *Kokkonen*, it is clear that constitutional and statutory limits on federal court power apply to exercise of ancillary and pendent jurisdiction. *See also Owen*, 437 U.S. at 372, 98 S. Ct. at 2401. The accepted constitutional test is whether there is a "common nucleus of operative fact" between the claim sought to be brought before the court and the accompanying federal claims. Without this "common nucleus," the matters are not part of the same constitutional "case."

This standard has recently been codified, without any relevant impact on the inquiry to be undertaken. 28 U.S.C. 1367, App., *infra*, at 73a, allows the exercise of "supplemental" jurisdiction over claims that "form part of the same case or controversy under Article III" of the Constitution as a case already properly in federal court.

ago, is three paragraphs long containing a conclusion, but virtually no discussion. It has rarely been cited as precedent." 838 F.2d at 1488. The dissent in *Argento* criticized the majority for reaching a decision "directly contrary" to *Beecher*. 838 F.2d at 1501.

A similar disagreement over the vitality of *Beecher* erupted in the Third Circuit in *Skevofilax*. The majority of the *en banc* court declined to follow *Beecher*, calling it a "delphic pronouncement" and dismissing the opinion because it did not expressly claim to "serve as a pronouncement on the constitutional limits of ancillary jurisdiction." 810 F.2d at 385 n.4. The dissent countered that *Beecher* did have precedential value, and that it should have controlled. 810 F.2d at 392-93.

Although not directly controlling, the analysis of this Court's unanimous opinion last term in *Kokkonen* clearly indicates that *Beecher* is good law and that the decision below was incorrect. *Kokkonen* considered whether a federal court has ancillary jurisdiction to enforce a settlement agreement from a prior federal case. After noting that federal courts have limited jurisdiction, possessing "only that power authorized by Constitution and statute," 114 S. Ct. at 1675, the Court concluded there is no automatic federal jurisdiction over a claimed breach of a settlement agreement. The factual issues involved in the two cases were plainly distinct, and the court's ability to function was not "imperiled by the alleged breach." 114 S. Ct. at 1677. The suit, in short, "involve[d] a claim for breach of a contract," and "automatic jurisdiction over such contracts is in no way essential to the conduct of federal-court business." *Id.* This analysis suggests that *Beecher* is right and the result below is wrong. There is no common nucleus of operative fact here, and the alleged wrong is not one that imperils the operation of the federal courts such that "automatic jurisdiction" over such a claim is "essential."

The instant case presents clearly the issue of the continuing vitality of *Beecher*. This is an attempt (i) in a second, separate lawsuit (ii) to invoke facts not in issue in the prior lawsuit [4] (iii) in order to hold liable a person not already within the federal court's jurisdiction.[5] Under *Beecher*, under the constitutionally mandated ancillary jurisdiction analysis contained in *Owen* and *Kokkonen*, and under various circuit court authorities we will describe below, ancillary jurisdiction should not have been exercised here. In light of the growing tendency to disregard *Beecher*, the Court should take this opportunity to make it plain that *Beecher*, and Article III principles in general, govern this case.

B. The Decision Below Broadens a Substantial Split of Authority Over the Scope of Federal Ancillary Jurisdiction.

1. *Cases Disagreeing with the Fourth Circuit.*

We provided at the beginning of this section a list of many of the federal court decisions following *Beecher* and

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[4] This issue is well presented here, as the Fourth Circuit several times relied on its conclusion that the facts in the instant case were different from the facts at issue in the original *Tru-Tech* litigation. *See* 39 F.3d at 501, App., *infra*, at 15a (distinguishing *Beecher* because alleged wrongs here were directed to "already-extent [*sic*] judgment"; *id.* n.10, App., *infra*, at 16a n.10 (distinguishing *Sandlin* on basis that this case involves "conduct by Peacock occurring after the judgment in the initial litigation"); *id.* at 503 n.14, App., *infra*, at 19a n.14 (activity leading to conclusion of veil-piercing here occurred *"after* the activity pursuant to which the corporation is deemed to have breached its ERISA fiduciary duties").

[5] Courts considering the issue have recognized that parties absolved of liability in a prior action should be treated as strangers to the judgment in that action for purposes of any subsequent action attempting to impose liability on them. *Argento*, 838 F.2d at 1488 n.7; *Skevofilax*, 810 F.2d at 384-85 (treating township as "nonparty to the original lawsuit" for purposes of imposing liability on township for individual officers' liability; *Berry*, 795 F.2d at 455 n.2.

in conflict with the result below. We describe some of those cases in more detail here.

Many of these opinions have acknowledged the passage from *Riggs* relied on by the Fourth Circuit, *see supra* note 1, which states that a federal court's jurisdiction continues after the entry of judgment, but have concluded that this holding does not mean that a federal court can do anything it pleases, to anyone it pleases, in the name of enforcing a judgment. *See Berry*, 795 F.2d at 455 (post-judgment jurisdiction described in *Riggs* "is limited to those actions that a court may take in that same action"); *National Westminster Bank*, 751 F. Supp. at 1160 (in construing *Riggs*, "where a party seeks to invoke ancillary jurisdiction to protect a judgment of the court, there must be a transactional relationship between the claims predicated on federal jurisdiction and the claims to be piggy-backed into the federal court" (internal quotation omitted)).

Prior to the decision below, the Tenth Circuit had most recently dealt with this matter. That court faced the precise issue presented by the present case—an attempt by a successful plaintiff to enforce his judgment against alleged alter egos of the judgment debtor—in *Sandlin*, 972 F.2d 1212 (10th Cir. 1992). Calling the precedents "largely consistent," the *Sandlin* court stated that "[w]hen a party asserts a postjudgment claim against a nonparty *not arising out of the operative facts that produced the original judgment, an independent basis for federal jurisdiction must exist.*" 972 F.2d at 1216 (emphasis added). Although noting that *Beecher* has recently been criticized as "dated and for its lack of exposition," the Tenth Circuit read *Beecher* "as saying that when postjudgment proceedings seek to hold nonparties liable for a judgment on a theory that requires proof on facts and theories significantly different from those underlying the judgment, an independent basis for federal jurisdiction must exist. So read, the opinion seems both consistent with most modern

court decisions and controlling upon us." 972 F.2d at 1217.

National Westminster Bank, supra, also involved an attempt by a judgment creditor to collect his judgment from principals of the corporate debtor by "piercing the corporate veil." 751 F. Supp. at 1159. The court declined ancillary jurisdiction in this separately filed lawsuit, because there was no nexus between the original claim and the veil-piercing action. "[P]etitioner's theories of fraudulent conveyance and piercing the corporate veil are removed from the original breach of contract action . . . . Petitioner's claims involve investigation into the facts of how the corporations at issue were run . . . ." 751 F. Supp. at 1160. The principle relied on in this case was drawn directly from the Second Circuit's opinion in *Manway Construction Co.*, 711 F.2d 501, 504 (2d Cir. 1983), which was also relied on by *Sandlin*. Although *Manway* involved different facts, its controlling principle is contrary to the ruling by the Fourth Circuit below, and the Second Circuit should be counted among the circuits in direct conflict with the Fourth Circuit's ruling.

In Berry, 795 F.2d 452, the Fifth Circuit refused to exercise ancillary jurisdiction over an attempt to collect a judgment from the alleged indemnitors of the judgment debtor. The *Berry* court first concluded that the two actions did not share a common nucleus of fact, noting that plaintiff's first action "arose out of an alleged violation of his constitutional rights," while the second involved a contract. "[T]he alleged obligations of the Town and NHI are completely independent of the primary judgment against McLemore." 795 F.2d at 455. The court concluded: "We can find no case where a court held that it had ancillary jurisdiction to consider claims in a *new and independent action* merely because the second action sought to satisfy or give additional meaning to an earlier judgment." *Id.*

Several decisions by the Ninth Circuit fall into this line of authority.[6] *Sederquist* holds that ancillary jurisdiction will not extend to "a separate case against different defendants." 861 F.2d at 558; *see also Redding Ford*, 722 F.2d at 498 (9th Cir. 1983) ("[a]ncillary jurisdiction cannot be extended beyond the claims asserted in one action"); *Fidelity & Casualty Company*, 596 F.2d at 918 (9th Cir. 1979) ("Whatever the current parameters of ancillary jurisdiction the doctrine has never extended beyond claims asserted in one action.").[7]

2. *Cases Agreeing with the Fourth Circuit.*

There are also courts that have agreed broadly with the ruling below. In our discussion of *Beecher* above, we discussed two of these cases, *Argento*, 838 F.2d 1483, and *Skevofilax*, 810 F.2d 378, which regard *Beecher* as having fallen into desuetude.

The other case agreeing with the result below reflects confusion within a circuit. In an opinion decided without oral argument less than one month after *Redding Ford*,

[6] As we discuss *infra*, there is one contrary opinion in the Ninth Circuit on this issue, but the majority of Ninth Circuit cases disagree with the Fourth Circuit.

[7] The Ninth Circuit cases do not involve attempts to enforce judgments, but their rationales nevertheless conflict directly with the result below. This highlights the fact that the ancillary jurisdiction cases involve two approaches, which complement one another, and which both disagree with the result below. One approach emphasizes that the facts involved in the veil-piercing analysis will typically be unrelated to the facts giving rise to substantive liability; absent a common nucleus of operative fact, there can be no ancillary jurisdiction. Other cases have not reached this stage of analysis, because they have held that ancillary jurisdiction can never extend to a second lawsuit; a federal court's power to hear ancillary matters stops at the boundaries of the suit over which it has original jurisdiction. Both issues are presented in this case, since it involves *both* a separate lawsuit *and* a clear disjunction of the relevant facts in the two cases. *See supra* note 4.

supra, the Ninth Circuit took a position inconsistent with its own precedents. *Blackburn Truck Lines v. Francis*, 723 F.2d 730 (9th Cir. 1984), was a separate lawsuit to collect a judgment in a freight charges case from the alleged alter egos of the bankrupt original defendants. Without citation to *Beecher* or the Ninth Circuit precedents mentioned above that expressly hold that ancillary jurisdiction will not extend to an entirely separate lawsuit, the *Blackburn* panel concluded that the federal courts did have ancillary jurisdiction over such a matter.

This is an area that is beset with considerable confusion; the various circuits employ various methods of analysis, with various results, and pay various amounts of deference to this Court's decision in *Beecher*. This case squarely and cleanly presents these issues, and the Court should take this opportunity to provide unity and guidance on this question.

Nor are the stakes trivial. The rule enunciated by the Fourth Circuit would open the federal courts to any separate lawsuit with the stated purpose of imposing a judgment entered in a federal court on a party not initially held liable for that judgment. Although the Fourth Circuit saw "no practical reason" not to exercise jurisdiction over such a matter, 39 F.3d at 502, App., *infra*, at 17a, such a rule would increase the load of federal cases without any efficiency advantages; since, by definition, these new cases involve entirely new issues, the federal courts that handled the prior actions have no advantage over the state courts in disposing of them. For these reasons as well, review by this Court is appropriate.

III. THE DECISION BELOW, BY FASHIONING AN ERISA REMEDY FOR ENFORCEMENT OF AN ERISA JUDGMENT, AND IMPOSING IT ON ONE HELD NOT TO BE A FIDUCIARY, CONFLICTS WITH THIS COURT'S RECENT DECISIONS INTERPRETING ERISA.

The decision below is in conflict with this Court's cases in *Mertens* and *Mackey*. It violates their teachings by fashioning a substantive ERISA remedy for the collection of judgments, and by applying that remedy to one who would not be held liable within the four corners of the ERISA statute. The question of whether there is an *ERISA* remedy in this case is of particular importance because, regardless of subject matter jurisdiction, the only basis for personal jurisdiction over Petitioner Peacock in South Carolina was ERISA's nationwide service of process provision. If Respondent has only a state law remedy for his wrong, he cannot sue Mr. Peacock in South Carolina. App., *infra*, at 59a.

The result also highlights considerable lower court confusion over the proper respect to be shown to corporate form in ERISA cases. Review by this Court is needed to establish the effect of its precedents and to give guidance on the deference to be given corporate form.

A. In *Mertens*, This Court Held That Courts Should Not Fashion ERISA Remedies Not Expressly Created by Congress. The Court Below Derived Just Such a Remedy from ERISA.

In *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), the Supreme Court held that ERISA does not authorize suits for monetary relief by plan participants against a *non*fiduciary. Observing that the only provision of ERISA allowing suit against nonfiduciaries provides for "equitable relief" only, the Court declined to expand the express provisions of ERISA to allow monetary recovery as well as equitable relief against a nonfiduciary.

After noting that ERISA is a "comprehensive and reticulated statute," 113 S. Ct. at 2066 (internal quotations omitted), this Court stated its own "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." 113 S. Ct. at 2071-72 (internal quotations omitted). In closing, the Court rejected an invitation to "give a strained interpretation to [ERISA] in order to achieve the [claimed] 'purpose of ERISA to protect plan participants and beneficiaries.'" 113 S. Ct. at 2071. The Court stated that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text," especially with respect to "ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests— not all in favor of potential plaintiffs." *Id.; see also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146, 105 S. Ct. 3085, 3092 (1985) ("carefully integrated" enforcement scheme of ERISA is "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly").

The Fourth Circuit treated the veil-piercing action brought by Respondent as "a substantive rule of liability." 39 F.3d at 499, App., *infra*, at 12a. It held that ERISA "preempts any state law of veil-piercing" and provides the rule of law for such an action. 39 F.3d at 503, App., *infra*, at 20a. By thus allowing a substantive cause of action, nowhere provided for in ERISA, to proceed as an ERISA action, the court below did precisely what *Mertens* said it should not.

B. *Mertens* is Also Violated by the Imposition of a Substantive ERISA Remedy Against a Person Adjudged Not to be a Fiduciary.

In *Tru-Tech*, the district court held and the Fourth Circuit affirmed that Grant Peacock was not a fiduciary of the ERISA plan at issue. As this Court explained in

Mertens, ERISA establishes a broad definition of fiduciary that "expand[s] the universe of persons subject to fiduciary duties—and to damages"—beyond the common law, which limited the reach of fiduciary duty to "formal trusteeship." 113 S. Ct. at 2071. The Court relied on this expansive definition of fiduciary in declining to further expand liability to non-fiduciaries under ERISA. The Court would not disturb "the balance . . . that the text adopted by Congress has struck." 113 S. Ct. at 2072.

In other words, Congress used the term "fiduciary" to describe precisely those persons and entities against whom ERISA provides remedies for breaches. The ruling below upsets this statutory balance by providing an ERISA remedy against a person expressly held not to be a fiduciary.

The rationales offered below for this departure from ERISA and this Court's guidance—that such a step was necessary to vindicate ERISA's "broad, remedial scope," App., *infra*, at 50a, and that ERISA "cannot be said to attach great weight to corporate form," 39 F.3d at 503, App., *infra*, at 22a—simply miss the point. The "remedial purpose" of ERISA, be it broad or narrow, is incorporated into the fiduciary liability standard and the "balance" struck by Congress. Similarly, fiduciary liability defines precisely the degree to which the court may reach behind the corporate veil. If a person "exercises any discretionary auhority or discretionary control" with respect to an ERISA plan, 29 U.S.C. § 1002(21)(A) then he or she can be held liable, regardless of the shielding presence of a corporation. An ERISA-based remedy that goes beyond this standard is at odds with the statute and with *Mertens*.

By treating the veil-piercing claim as arising under ERISA, the court below went beyond the statute, and was able to find personal jurisdiction over Petitioner Peacock where none would otherwise exist.

C. By Fashioning a Separate, Substantive ERISA Remedy for the Enforcement of ERISA Judgments, the Fourth Circuit also Violated this Court's Decision in *Mackey*.

In *Mackey v. Lanier Collection Agency & Service*, 486 U S. 825, 833, 108 S. Ct. 2182, 2187 (1988), the Court explained that "ERISA does not provide an enforcement mechanism for colletcing judgments won" in civil enforcement actions under ERISA's 29 U.S.C. § 1132. "Consequently," the Court concluded, "state-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA[.]" 486 U.S. at 834, 108 S. Ct. at 2187-88. Once the judgment is in hand, an ERISA judgment debtor is no different from any other judgment debtor.

Mackey plainly applies here, for there can be no doubt that Respondent Thomas's intent in bringing this action was to collect the prior judgment.[8] As the Fourth Circuit

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[8] To be sure, the facts of *Mackey* are different from those of this case, but the holding of *Mackey* is clear and its import is unmistakable—ERISA does not provide a separate substantive remedy for the collection of ERISA judgments. Moreover, the Fourth Circuit's divergence from *Mackey* is made manifest by the two opinions' inconsistent rulings on the matter of ERISA preemption of collection actions.

Mackey involved two issues, both of which arose from an attempt by a Georgia collection agency to garnish welfare plan benefits to collect money judgments. In the first portion of its opinion, the *Mackey* Court struck down a Georgia statute that specifically exempted ERISA plans from "the process of garnishment," on the grounds that the law made "reference to" an ERISA plan and thus was preempted by ERISA. 486 U.S. at 829-30, 108 S. Ct. at 2185-86.

The second portion of the opinion went on to consider whether the entire Georgia garnishment procedure was preempted by ERISA. It was in this context that the Court concluded that ERISA does not provide its own mechanism for the enforcement of judgments; hence, the Court held that state law mechanisms must be used and that the garnishment statute was not preempted.

stated plainly in its opinion, "this is, at bottom, a proceeding the goal of which is to collect the judgment earlier obtained by the plaintiff class." 39 F.3d at 501, App., *infra*, at 16a.

Mackey reinforces, in the specific context of actions to enforce ERISA judgments, the general principles of *Mertens* that courts are not free to create new ERISA remedies. Nevertheless, the opinion below provided Respondent with a federal substantive remedy to assist him in haling Petitioner into court and collecting the ERISA judgment. *Mackey* teaches that there is no such remedy.

D. The Decision Below Contributes to a Broad and Continuing Confusion over the Respect to be Accorded the Corporate Veil in ERISA Litigation. The Court's Guidance is Needed on this Question.

In the context of breach of fiduciary duty, a number of circuits have held, as the Fourth Circuit did below, that ERISA has little regard for the corporate form, and that the corporate veil of a corporate fiduciary may be breached almost at will to reach a solvent shareholder or director. The leading case in this area, relied on heavily below, is *Alman v. Danin*, 801 F.2d 1 (1st Cir. 1986); *see also Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209 (2d Cir. 1987).

On the other hand, ERISA cases involving suits against employers for delinquent plan contributions have taken a much more cautious approach to the corporate veil. Although many of these cases allude to the possibility of veil-piercing in the appropriate circumstance, they do not suggest that the corporate form can be tossed aside whenever convenience or the "broad remedial purpose" of ERISA so demand. Indeed, these cases point out that

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486 U.S. at 830-40, 108 S. Ct. at 2186-91. This is *precisely contrary* to the holding of the Fourth Circuit below that ERISA does "preempt[] any state law of veil-piercing" in the context of collection of judgments. 39 F.3d at 503, App., *infra*, at 20a.

Congress could have imposed broader ERISA liability on corporate insiders had it chosen, but that it did not. *See, e.g., International Bhd. of Painters v. George A. Kracher, Inc.*, 856 F.2d 1546, 1550 (D.C. Cir. 1988) (declining to hold principal shareholder and chief officer liable for corporation's ERISA contributions; "Limited liability is a hallmark of corporate law. Surely if Congress had decided to alter such a universal and time-honored concept, it would have signaled that resolve somehow in the legislative history."); *Connors v. P&M Coal Co.*, 801 F.2d 1373, 1376 (D.C. Cir. 1986) (rejecting "interest and control" test for imposition of individual liability for corporate obligations; noting that such a lowered standard would "discourage future participation in multiemployer pension plans"); *Operating Engineers Pension Trust v. Reed*, 726 F.2d 513, 515 (9th Cir. 1984) (no special standard of veil piercing set forth in employer contribution case).

The decision below highlights the divergence of views among the circuits as to the respect to be paid to the corporate form in ERISA actions; this divergence shows itself in a comparison of fiduciary breach and employer contribution cases, although there is no statutory or policy difference in the two areas that would justify such different degrees of deference to corporate form. Because of the importance of these issues, and because of the substantial disincentive to provision of ERISA plans by employers that the liberal rule of veil-piercing enunciated below creates, the Court should take this case to clarify the rules under which ERISA liability may be imposed on corporate shareholders or managers.

CONCLUSION

Review of the decision below is necessary to end the confusion regarding the scope of the federal courts' ancillary jurisdiction, and to address the important ERISA issues presented here. Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to consider the questions presented by this case.

Respectfully submitted,

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March 1, 1995

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 92-2524, 93-1394 and 93-1469

JACK L. THOMAS, Individually, on behalf of the Tru-Tech, Incorporated Pension Plan, and as a representative of a class of plaintiffs similarly situated,

Plaintiff-Appellee,

v.

D. GRANT PEACOCK,

Defendant-Appellant,

and

ALAN H. FINEGOLD,

Defendant.

JACK L. THOMAS, Individually, on behalf of the Tru-Tech, Incorporated Pension Plan, and as a representative of a class of plaintiffs, similarly situated,

Plaintiff-Appellee,

v.

D. GRANT PEACOCK,

Defendant-Appellant,

and

ALAN H. FINEGOLD,

Defendant.

JACK L. THOMAS, Individually, on behalf of the Tru-Tech, Incorporated Pension Plan, and as a representative of a class of plaintiffs, similarly situated,

Plaintiff-Appellee,

v.

TRU-TECH, INC.; D. GRANT PEACOCK,

Defendants-Appellants,

and

GRANT PEACOCK AND COMPANY, INC.; CONNECTICUT GENERAL LIFE INSURANCE COMPANY,

Defendants.

Argued May 9, 1994

Decided Nov. 4, 1994

Before RUSSELL and WIDENER, Circuit Judges, and CHAPMAN, Senior Circuit Judge.

Affirmed in part and vacated and remanded in part by published opinion. Judge RUSSELL wrote the opinion, in which Judge WIDENER and Senior Judge CHAPMAN joined.

OPINION

DONALD RUSSELL, Circuit Judge:

Jack L. Thomas ("Thomas"), a former employee of Tru-Tech, Inc. ("Tru-Tech"), brought a suit under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, on behalf of a class of former Tru-Tech employees against Tru-Tech and D. Grant Peaccok ("Peacock"), an officer and shareholder of Tru-Tech. The district court held for the plaintiff class as against Tru-Tech, but held Peacock not liable as a

plan fiduciary. *Thomas v. Tru-Tech, Inc.*, No. 87-2243-3, 1988 U.S.Dist. LEXIS 15929, 1988 WL 212511 (D.S.C. Nov. 28, 1988). On appeal, we affirmed the district court's judgment in all respects. *Thomas v. Tru-Tech, Inc.*, 900 F.2d 256 (4th Cir.1990) (unpublished disposition; full text reported at 1990 WL 48865).

Thomas then brought suit, purportedly on behalf of the plaintiff class certified in the earlier suit,[1] against Peacock, individually, and against Peacock's attorney, Alan H. Finegold ("Finegold"), seeking to collect the earlier judgment. Among various theories for recovery, Thomas sought to pierce Tru-Tech's corporate veil and reach Peacock. The district court rejected Thomas' claim against Finegold, but allowed plaintiffs to recover as against Peacock based upon their veil-piercing theory. *Thomas v. Peacock*, No. 7:91-3843-21, 1992 U.S.Dist. LEXIS 18749 (D.S.C. Oct. 28, 1992). Peacock appeals. We affirm.

Peacock also appeals the district court's assessment of attorneys' fees against him with respect to both litigations pursued by Thomas. We vacate the award of attorneys' fees and remand for further proceedings.

I.

In August of 1987, Thomas, on behalf of a class of similarly situated former Tru-Tech employees, filed suit against Tru-Tech and Peacock seeking payment of benefits due under Tru-Tech's pension plan (the "initial litigation"). The complaint raised numerous claims for relief, including breach of fiduciary duty under ERISA. The district court found Tru-Tech, but not Peacock, to be a plan fiduciary; it further found that Tru-Tech had breached

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[1] Thomas describes this suit as a continuation of the prior class action and, accordingly, asserts that this suit is also brought on behalf of the class. As discussed *infra*, Peacock disputes this assertion.

its fiduciary duties. On appeal, we affirmed the district court in all respects.[2]

Thomas subsequently sought to execute judgment against Tru-Tech in Pennsylvania, but was unsuccessful. Thomas then brought the present suit against Peacock, individually, and against Peacock's attorney, Finegold, on theories of civil conspiracy, fraudulent transfer of assets, and corporate veil-piercing under ERISA. The district court approved of plaintiffs' attempt to pierce Tru-Tech's corporate veil and determined that plaintiffs were entitled to collect from Peacock their earlier judgment against Tru-Tech; the court otherwise rejected plaintiffs' claims. Peacock appeals.

II.

In 1981, Rockwell International decided to sell the textile machinery parts manufacturing business of its Draper Division; this business was conducted at two plants, one in Marion, South Carolina, and the other in Beebe River, New Hampshire. A Delaware corporation named Tru-Tech was organized for the purpose of acquiring this business. Tru-Tech maintained an office in Spartanburg, South Carolina; Bill Wilcock ("Wilcock") was appointed its president and chief executive officer. A partnership named Marion Limited Partners ("Marion LP") was established for the purpose of purchasing the Marion, South Carolina, plant from Rockwell International and leasing it to Tru-Tech.

Among the investors in Tru-Tech was appellant Peacock. Peacock was the sole stockholder and director of Peacock, Williams & Company ("PW & C").[3] Peacock

[2] We summarized the facts underlying the initial litigation in our earlier opinion, *see* 1990 WL 48865, at *1-*2.

[3] In fact, PW & C was first called D. Grant Peacock & Company, and then Peacock, Williams & Company; it subsequently reverted to its original name. For ease of reference, we refer to it throughout our opinion as "PW & C."

was a CPA and a lawyer who also served as a partner in Marion LP. Marion LP's sole general partner, however, was Wilcock.

Despite high hopes, Tru-Tech quickly fell on hard times.[4] When, by September of 1983, Tru-Tech had already lost a substantial sum of money, Wilcock was replaced by John H. Blackburn ("Blackburn"), previously Tru-Tech's vice president of operations. When Tru-Tech's board determined that it was not viable for Tru-Tech to continue in business, it became Blackburn's responsibility to liquidate Tru-Tech's assets.

In 1985, Tru-Tech relocated its offices to space rented by PW & C in Pittsburgh, Pennsylvania. Timothy H. Williams ("Williams"), PW & C's president, assumed the role of Tru-Tech's executive vice president, treasurer and secretary. From late 1986 through late 1988, PW & C billed Tru-Tech for incidentals such as telephone, travel,

[4] The district court noted:

> The promoters and founders of Tru-Tech expected the business to derive substantial revenue primarily from two sources. First, they expected to continue supplying parts to Rockwell's Draper Division which manufactured looms. Second, they believed that Tru-Tech had purchased the tooling for Draper parts and that they could sell these parts on the open market. Unfortunately, their expectations did not come to fruition and the business failed.
>
> Despite the general sluggishness in the textile industry at the time, the demise of Tru-Tech can be attributed to two events that occurred simultaneously. First, within six months of Tru-Tech's purchase of Rockwell's Draper parts manufacturing business, Rockwell sold its Draper Division to another group of investors who immediately reduced inventories, thus severely reducing orders Tru-Tech expected to fill. Second, the "new" Draper filed suit against Tru-Tech alleging that Draper, not Tru-Tech, had the tooling rights for Draper parts. It was determined subsequently that Draper had in fact retained these rights, and it was at this point that Tru-Tech's potential for profit was eliminated.

1992 U.S.Dist. LEXIS 18749, at *3-*4.

entertainment, legal, postal and office supply expenses. Peacock testified that, at that time: "We ha[d]n't been keeping the accounting records . . . for Tru-Tech since it it had no employees." J.A. 345.

By February of 1986, Tru-Tech had managed to sell all of its productive assets in South Carolina. Operations at the Beebe River Plant in New Hampshire ceased in June of 1986 and management sought to liquidate the assets at that plant to reduce Tru-Tech's financial liabilities. Despite this effort, Tru-Tech's negative net worth continued to increase from $893,676.00 on September 30, 1986 to $1,376,888.00 by September 30, 1990.

As Tru-Tech's troubles continued to mount, Peacock took it upon himself to "buy out" other investors who, purportedly, could less well withstand the impact of Tru-Tech's financial downturn than could he. As a result, by 1987, Peacock controlled in excess of 70% of Tru-Tech's stock. This domination continued until 1990,[5] when, on Finegold's advice, Peacock sold 724,980 shares to Williams and Blackburn for $200 in order to bring his holdings below the 50% mark. Moreover, from March 1988 until February 1990 and, effectively, until Tru-Tech's final dissolution in May 1990, Peacock served as the company's sole director.

Peacock testified that, following the suspension of Tru-Tech's operations, in July 1986, Blackburn was placed on PW & C's payroll for the purpose of "wrapping-up Tru-Tech's affairs." For this service and for the rent for a portion of PW & C's office in Pittsburgh, PW & C billed Tru-Tech $10,000 each month; this liability eventually grew to more than $110,000. PW & C issued invoices to Tru-Tech which described the $10,000 a month charge as levied for the services rendered by Blackburn, an engineer by trade, as having been billed for "FINANCIAL CONSULTING SERVICES." *E.g.*, J.A. 443. This liability was not long maintained on PW & C's books, however, since, according to an August 3, 1989, memorandum to Williams, "the management fee receivable of [approximately] $110,000 was written off in the year ended 1/31/87." J.A. 593. Nevertheless, as described below, Tru-Tech receivables were subsequently transferred from Tru-Tech to PW & C and to other Peacock-affiliated entities, purportedly in consideration for this liability owed PW & C by Tru-Tech.

[5] Although the stock certificates exhibit dates in 1987, they were not forwarded to Blackburn for his signature until 1990.

On November 28, 1988, as described above, the district court entered judgment in favor of the plaintiff class against Tru-Tech, which timely filed its notice of appeal, leaving Tru-Tech beset by numerous large liabilities, including the *Thomas* judgment, some $50,000 owed to PW & C and approximately $350,000 owed to Peacock individually. After discussions with Peacock concerning the *Thomas* judgment against Tru-Tech, Finegold, by letter dated March 2, 1989, advised Peacock:

> I see no reason for any payment with regard to the Thomas litigation unless and until the judgment becomes final and constitutes a lien on real estate held for sale. As I understand the situation, the corporation owns no real estate in South Carolina and the plaintiffs have made no effort to attach the corporation's property in New Hampshire at this time. It remains quite desirable then, to effect the disposition, for acceptable consideration, of the New Hampshire realty before the plaintiffs attempt to reach it. You will need, nevertheless, to pay any legal fees owed to Tru-Tech, Inc.'s counsel in the Thomas case in order to keep them involved in the appeal process.

J.A. 625 ¶ c. The letter goes on to suggest, as a means of "protect[ing] the [Tru-Tech] real estate against any claims in the Thomas case and to preserve some possibility of recovery of some portion of the amounts owed to you and your corporation, . . . an arrangement," J.A. 625-26, under which a new corporation would be formed in New

Hampshire for the purpose of assuming ownership of the Tru-Tech real estate. Finegold advised that "the arrangement suggested allows you and Peacock, Williams & Company to recover $130,000 if the new corporation eventually succeeds in consummating the sale of the premises," J.A. 626, subject to the proviso that "the possibility exists of treatment of the transfer as a voidable preference," J.A. 626.

Peacock and Finegold then held a meeting to discuss further the subject of the Tru-Tech judgment, "as a consequence of which," J.A. 628, Finegold, in a March 13, 1989 letter, identified for Peacock "the various matters on which we had settled as a strategy," J.A. 628, including, in particular, the following:

> (3) The [Tru-Tech] corporation will refrain, for the time being, from payment of any obligations arising out of the Thomas litigation, pending further developments on this front.
>
> . . . .
>
> (7) The [Tru-Tech] corporation will, with the use of its receivables, pay down the amounts owed to Peacock, Williams & Company, and to you, personally, in order to start running the one year period for avoidance of preferences to control persons in bankruptcy.

J.A. 628.

The "strategy" outlined in Finegold's letters to Peacock was never fully implemented. Still, several questionable transactions were executed during this general time frame. We summarize them here.

On April 30, 1988, a $31,804 Tru-Tech receivable from Marion LP was "netted on Tru-Tech's books" so as to become a receivable of PW & C. J.A. 433.

By authorization dated October 31, 1988, Peacock, as sole director of Tru-Tech, transferred a $27,235.08 Tru-

Tech receivable known as the "Uhlman note" to Finegold and Peacock's wife as trustees of the D. Grant Peacock trust, the beneficiary of which is Peacock's wife. In return for this transfer, Finegold claimed, by letter dated April 3, 1989, to have forwarded to Peacock checks payable to Tru-Tech for $27,235.08. The letter requests that Peacock furnish Finegold with "a schedule showing the application by Tru-Tech of the $27,235.08 paid, an application which, I assume, involves some favored creditors like Peacock, Williams & Company, Incorporated." J.A. 618.

Judge Traxler concluded "that there was either no consideration paid for the assignment of the Uhlman note on October 31, 1988, or the assignment was simply backdated to reflect that as the supposed date of transfer," 1992 U.S.Dist. LEXIS 18749, at *12, and, further, "that the purpose of the sale of the Uhlman Note was to get enough cash into Tru-Tech to pay the $25,000 retainer to Greenville [counsel] for the purpose of handling the appeal of the *Thomas* judgment," *id.;* October 31, 1988, the purported date of the sale, predates the entry of judgment in favor of plaintiffs in the original trial.

At a March 6, 1989, Tru-Tech board meeting attended by Peacock, Finegold and Blackburn, Peacock agreed to pay $130,000 of Tru-Tech funds to PW & C. Peacock asserts that this was to repay PW & C for money paid to Blackburn to manage Tru-Tech's affairs, even though, prior to that date, the evidence showed that PW & C had "written off" that amount due.

On a June 26, 1989, Tru-Tech pro forma balance sheet, Peacock made a handwritten note that a $47,000 Tru-Tech receivable known as the "Brodsky note" should be transferred to PW & C. Further, next to numerous balance sheet liability entries, including the entry "Judgment —Jack Thomas Case" as well as entries for interest thereon and estimated attorneys' fees, is the handwritten word, "Forget." J.A. 542.

By unanimous consent order dated July 1, 1989, the Tru-Tech board of directors, of which Peacock was by then the sole member, approved the transfer of the Brodsky note to PW & C "for accounts payable owed by Tru-Tech to Peacock Williams." J.A. 590. Blackburn, as Tru-Tech's president, formally executed the transfer on October 20, 1989, "for consideration paid," J.A. 588.

On November 1, 1989, Tru-Tech assigned a $5,737.75 receivable from Marion LP to PW & C.

On February 15, 1990, Peacock resigned as a director of Tru-Tech. Yet, as late as May of that year, Peacock continued to sign checks, drawn on Tru-Tech's bank accounts, for legal fees.

On April 26, 1990, Blackburn tendered his letter of resignation as Tru-Tech's president. Nevertheless, for some six months thereafter, Blackburn remained on PW & C's payroll and continued to oversee the "wrapping up" of Tru-Tech's affairs.

On May 1, 1990, Williams resigned as Tru-Tech's executive vice president, treasurer and secretary. Yet, on May 4, 1990, he authorized the assignment of a $5,000 mortgage from Tru-Tech to PW & C.

When, in 1990, the plaintiff class, by way of Pennsylvania counsel, served interrogatories on PW & C, Finegold, and Peacock and his wife, Finegold responded, by letter dated August 30, 1990:

> [A]s I understand the situation, Tru-Tech, Inc., . . . has discontinued its businesses, and disposed of all its fixed assets . . .; and all of its directors and officers with any detailed knowledge of the businesses and affairs of the corporation have resigned. As a practical matter, then, the corporation is defunct; and there is no one known to Grant Peacock or to me who has the authority and knowledge to prepare the answer demanded to the interrogatories propounded.

J.A. 632.

Based on the foregoing, the district court found that Peacock failed to observe the traditional corporate format and engaged in a "corporate strategy" with "the specific intent and purpose . . . [of] siphon[ing] off [Tru-Tech's] assets to favored creditors owned or controlled by Peacock and to defeat collection of the *Thomas* judgment." 1992 U.S.Dist. LEXIS 18749, at *19. Peacock appeals.

III.

Peacock argues that this suit is one merely to collect an outstanding judgment and that, because ERISA is not thereby implicated, the district court lacked subject matter jurisdiction over this case.[6] He also argues that, even if the district court properly exercised jurisdiction, it erred in applying a federal common law, as opposed to state law, standard for piercing the corporate veil. Proper evaluation of these contentions requires that we examine the nature of an attempt to pierce the corporate veil.

As we explained in *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681 (4th Cir.1976):

> [I]t is recognized that a corporation is an entity, separate and distinct from its officers and stockholders, and that its debts are not the individual indebtedness of its stockholders. This is expressed in the presumption that the corporation and its stockholders are separate and distinct. . . . But this concept of separate entity is merely a legal theory . . . and the courts "decline to recognize [it] whenever recognition of the corporate form would extend the principle of incorporation 'beyond its legitimate purposes and [would] produce injustices or inequitable consequences.' "

Id. at 683 (citation and footnote omitted) (quoting *Krivo Indus. Supply Co. v. National Distillers and Chem.*

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[6] It is undisputed that there is no diversity of citizenship in this action, and that there is no basis for federal question jurisdiction other than the fact that the suit seeks to enforce a judgment obtained pursuant to ERISA.

Corp., 483 F.2d 1098, 1106 (5th Cir.1973), *modified*, 490 F.2d 916 (1974)).

"An attempt to pierce the corporate veil is not itself a cause of action but rather is a means of imposing liability on an underlying cause of action . . . ." 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 41, at 603 (perm. ed. rev. vol. 1990).[7] However, although an attempt to pierce the corporate veil is necessarily subsidiary to some primary cause of action, it is not simply an attempt to collect a preexisting liability against an entity already found liable under the relevant substantive law; it is, rather, an attempt to impose such a preexisting liability upon an entity *not otherwise liable*. *See Sandlin v. Corporate Interiors Inc.*, 972 F.2d 1212, 1217 (10th Cir.1992) (in a "cause of action based upon the alter ego theory[,] . . . in theory the court is merely trying to identify the true debtor on the judgment"). Thus, the doctrine of piercing the corporate veil is not a mere procedural rule relating to "how" a judgment is to be enforced, but is, rather, a substantive rule of liability. *See Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 149 (3d Cir.1988) (holding that, in diversity case, federal district court properly applied New Jersey substantive law of veil-piercing). Last, we note that "the doctrine of piercing the corporate veil is an equitable one." 1 Fletcher, *supra*, § 41, at 603.

IV.

Peacock argues that, once the plaintiff class won its judgment against Tru-Tech, it became a judgment creditor, like any other. The district court, he argues, therefore lacked subject matter jurisdiction over Thomas' attempt to pierce the corporate veil. We reject this argument.

It is black letter law that

[7] We note that, at page 27 of his brief, Peacock, albeit in another context, relies upon this very excerpt from Professor Fletcher's treatise.

> the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. . . . Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.

Riggs v. Johnson County, 73 U.S. (6 Wall.) 166, 187, 18 L.Ed. 768 (1867). We established above that an attempt to pierce the corporate veil is a matter of substantive law that determines whether a corporate shareholder can be held liable for a preexisting judgment entered against the corporation. An attempt to pierce the corporate veil, therefore, seeks to identify those parties against whom the judgment can be satisfied. Because identification of those parties who are liable is necessarily antecedent to procedural enforcement of the judgment against those parties, and because *Riggs* establishes that federal courts have "ancillary" jurisdiction over enforcement of judgments, it would seem that the federal courts' "ancillary" jurisdiction would extend to the instant attempt to pierce the corporate veil.

Before we leave the issue, however, we must assure ourselves that our conclusion is in accord with the Supreme Court's holding in *H.C. Cook Co. v. Beecher*, 217 U.S. 497, 30 S.Ct. 601, 54 L.Ed. 855 (1910).[8] There, a

[8] The Seventh Circuit in *Argento v. Village of Melrose Park*, 838 F.2d 1483, 1488 (7th Cir. 1988), discounted the Justice Holmes' opinion in *Beecher* as a "case, decided over 75 years ago, [that] is three paragraphs long containing a conclusion, but virtually no discussion." Further, noted that Court, "[i]t has rarely been cited as precedent." *Id.* We are skeptical of the Seventh Circuit's notion that, as an inferior court, we may evade Supreme Court precedent on grounds of "desuetude." *Cf. United States v. Chase*, 18 F.3d 1166, 1169 (4th Cir.1994) ("Although there has been little discussion of [*Ball v. United States*, 140 U.S. 118, 11 S.Ct. 761, 35 L.Ed. 377 (1891),] since it was decided in 1891, the Supreme Court and the Eighth Circuit, in deciding other issues, have recognized its continued vitality."). Nor are we convinced, as was

Connecticut corporate patentholder brought a patent infringement suit in federal court against another Connecticut corporation. During the pendency of the suit, the directors of the defendant corporation voted to continue sales in alleged violation of the plaintiff's patent. Plaintiff proved the victor in the patent infringement case but was unable to collect from the defendant corporation, which was by then insolvent.

Plaintiff then filed a second suit in federal court against the directors of the insolvent corporation. In its complaint, plaintiff alleged that the defendants voted to continue sales "kn[o]w[ing] that [insolvency] would be the result of a judgment against [their corporation in the first suit], but did the acts alleged for the purpose of increasing the value of their stock in the company, and of receiving the profits and dividends that might be received from the sale." *Id.* at 498, 30 S.Ct. at 601-02.

On plaintiff's appeal of the second suit, Justice Holmes, writing for the Court, rejected Plaintiff's characterization of the suit as one to hold the directors jointly and severally liable with their corporation for their part in infringing plaintiff's patent, *id.*, instead according plaintiff's complaint its "natural interpretation [as] an attempt to make the defendants answerable for the judgment already obtained," *id.* The Court then summarily concluded that the case "of course [did] not" fall within the federal court's ancillary jurisdiction. *Id.* at 499, 30 S.Ct. at 602.

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the Third Circuit in *Skevofilax v. Quigley*, 810 F.2d 378, 385 n. 5 (3d Cir.) (en banc), *cert. denied*, 481 U.S. 1029, 107 S.Ct. 1956, 95 L.Ed.2d 528 (1987), that "Justice Holmes probably intended the [*Beecher*] opinion to be an interpretation of the . . . governing statute," and that the possibility that Justice Holmes might have "intended his opinion to serve as a pronouncement on the constitutional limits of ancillary jurisdiction" should be dismissed because "he certainly kept that intention to himself, for it is nowhere mentioned in the opinion." In any event, we may assume *Beecher*'s continuing vitality, for the case is distinguishable on its facts from the case now before us.

The Court concluded: "[I]f the directors are under obligations by Connecticut to pay a judgment against their corporation, that is not a matter that can be litigated between citizens of the same State in the Circuit Court of the United States." *Id.*

Beecher is factually distinguishable from the case at bar. While the instant case involves allegations that Peacock deliberately engaged in improper transfers and improperly ignored corporate formalities with the specific purpose of evading the already-extent judgment against Tru-Tech, *Beecher* involved an allegation that corporate directors, acting within their legal capacity, voted to continue sales of a product which was the subject of a then-pending patent infringement suit. *Beecher*, however, does make clear that the mere fact that a "former judgment [provides] the foundation of [a subsequent] case," *id.*, is insufficient, alone, to establish that the subsequent case falls within the federal court's ancillary jurisdiction. In particular, where the subsequent action is truly "independent" of the former action and judgment, there is no ancillary jurisdiction. *See Sandlin v. Corporate Interiors Inc.*, 972 F.2d 1212, 1217 (10th Cir.1992) ("We read *Beecher* as saying that when postjudgment proceedings seek to hold nonparties liable for a judgment on a theory that requires proof on facts and theories significantly different from those underlying the judgment, an independent basis for federal jurisdiction must exist."); *Berry v. McLemore*, 795 F.2d 452, 455 (5th Cir.1986) ("garnishment actions against third parties are construed as independent actions from the primary action which established the judgment debt" and, therefore, the "court's ancillary jurisdiction to enforce its judgment does not extend to these garnishment actions").[9]

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[9] We do not, by our citation of the Fifth Circuit's decision in *Berry*, mean to imply a holding that garnishment actions against third parties are, in fact, "independent actions from the primary action which established the judgment debt"; that issue, of course, is not now before us.

Without defining the precise contours of when a subsequent litigation is "independent" of a former litigation and judgment, we believe that Thomas' attempt to pierce the corporate veil is not "independent" of the initial litigation herein. As noted above, an attempt to pierce the corporate veil is necessarily subsidiary to some primary cause of action. That Thomas opted to file a separate action to pierce Tru-Tech's corporate veil is irrelevant: the court's subject matter jurisdiction does not turn on whether Thomas pursued the procedurally proper route. Further, we do not believe that the possibility that Thomas may not have been able to pursue this litigation at the same time as the initial litigation should affect the fact that this is, at bottom, a proceeding the goal of which is to collect the judgment earlier obtained by the plaintiff class. *Cf. Sandlin v. Corporate Interiors Inc., supra*, 972 F.2d 1212;[10] *but cf. Blackburn Truck Lines, Inc. v.*

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[10] In *Sandlin*, a successful age discrimination plaintiff sought to collect judgment against the owners of the debtor corporation, who were not parties to the initial age discrimination litigation, on an alter ego theory. The Tenth Circuit read *Beecher*, which it described as "[a] typically cryptic Justice Holmes opinion," 972 F.2d at 1217, to say "that when postjudgment proceedings seek to hold nonparties liable for a judgment on a theory that requires proof on facts and theories sigificantly different from those underlying the judgment, an independent basis for federal jurisdiction must exist," *id.* Purporting to apply that standard to the case before it, the court, "[w]ithout attempting to decide all future cases, when the alter ego contentions may be more intertwined with the merits of the underlying claim within the court's primary jurisdiction, we hold the district court properly dismissed the instant alter ego claims." *Id.* at 1218. The court reached this conclusion on the grounds that the attempt to invoke the alter ego doctrine involved "significantly different factual proof, new parties, [and] prejudgment actions." *Id.* By contrast, the court indicated that "[p]ursuing the new parties . . . on a successor theory" would be viable to the extent that plaintiff could allege "postjudgment transfers of [the corporate debtor's] property." *Id.* (citing *Chris-*

Francis, 723 F.2d 730 (9th Cir.1984)[11]. There is, in short, simply no practical reason to treat this litigation

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tiansen v. Mechanical Contractors Bid Depository, 404 F.2d 324 (10th Cir.1968)).

The Tenth Circuit's holding in *Sandlin* is not inconsistent with, and, indeed, can be read to support, our conclusion herein. First, the case at bar involves primarily conduct by Peacock occurring after the judgment in the initial litigation was obtained. Moreover, to whatever extent the Tenth Circuit may properly have observed that, for jurisdiction to lie, "alter ego contentions [should] be [somewhat] intertwined with the merits of the underlying claim," we note that the district court here found that Peacock engaged in a strategy with "the specific intent and purpose . . . [of] siphon[ing] off [Tru-Tech's] assets to favored creditors owned or controlled by Peacock and to defeat collection of the *Thomas* judgment." 1992 U.S.Dist. LEXIS 18749, at *19.

[11] In *Francis*, the plaintiff, who was unable to collect upon default judgments it previously had obtained against two bankrupt corporations, brought suit against the three owners of both corporations, seeking to pierce the corporate veil. The court of appeals held that jurisdiction was proper in the district court. Reasoned the court: "In one sense this suit is an effort to enforce the initial default judgment; in another sense it is an effort to accomplish what a joinder might have provided." *Id.* at 732.

We do not believe that the Ninth Circuit's reference to joinder has bearing here. This is because Peacock was in fact a party to the initial litigation, although not in the same capacity as he was in the phase of litigation now under review. Moreover, plaintiffs presumably could not successfully have pursued their veil-piercing claim because most of the actions which led the district court to its conclusion had then yet to occur. Nevertheless, we do not think that these differences warrant a different conclusion as to jurisdiction. Especially where, as here, a stock-holder has deliberately manipulated corporate assets in order to frustrate the ability of one who holds a judgment against the corporation by virtue of federal law, we think it clear that the federal courts have jurisdiction to ensure that the federal judgment is ultimately collected. To the extent that the Ninth Circuit's opinion in *Francis* suggests otherwise, we respectfully disagree.

We would note that the *Francis* court made no mention of the Justice Holmes' opinion in *Beecher*.

as separate from the initial litigation.[12] *Cf. Pineville Real Estate Operation Corp. v. Michael,* 32 F.3d 88 (4th Cir. 1994) (holding that there is no federal question jurisdiction over case where the plaintiff brought action against defendants who had, in an earlier ERISA case, obtained judgments against the plaintiff, seeking to enjoin state enforcement of the judgment liens obtained by defendants and where the only federal statute or rule relied upon in plaintiffs complaint was Fed.R.Civ.P. 54(b)).

Peacock places heavy reliance upon the Supreme Court's statement in *Mackey v. Lanier Collection Agency & Service,* 486 U.S. 825, 833, 108 S.Ct. 2182, 2187, 100 L.Ed.2d 836 (1988), that "ERISA does not provide an enforcement mechanism for collecting judgment won" in either actions brought against plans by purported beneficiaries or in actions brought by general creditors of the plan, *see* ERISA § 502, 29 U.S.C. § 1132. Peacock reads this statement out of context. The *Mackey* Court immediately proceeded to note that, while ERISA did not provide for an enforcement mechanism, where suit is filed in federal court, judgment enforcement is conducted pursuant to Federal Rule of Civil Procedure 69(a), which adopts state law for judgment enforcement mechanisms. 486 U.S. at 833-34, 108 S.Ct. at 2187-88. Thus, the mere fact that ERISA may not provide an explicit mechanism for judgment enforcement does not mean that ERISA does not provide *jurisdiction* for judgment enforcement. Therefore, even assuming, *arguendo,* that piercing the corporate veil is merely a method of judgment enforcement,[13] *Mackey* does not undermine but, rather, supports the district court's exercise of jurisdiction.

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[12] For this reason, we reject Peacock's challenge to the venue of the instant litigation, as well as his contention that the district court erred in failing to certify the plaintiff class for purposes of the instant litigation.

[13] We, in fact, consider and reject this argument below.

Peacock also claims that the Supreme Court's decision in *Mertens v. Hewitt Associates,* —— U.S. ——, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), establishes that the instant litigation against him was improperly maintained. We disagree. In *Mertens,* the Court hold that ERISA provides for no action for monetary damages against nonfiduciaries. The current attempt by plaintiffs is not, however, as discussed above, an independent action for monetary damages against a nonfiduciary, but an equitable attempt to satisfy a previous judgment entered against a fiduciary.

We therefor conclude that jurisdiction was proper in the district court.

V.

Having determined that the court below properly exercised jurisdiction over Thomas' claim, we now turn to whether the district court applied the proper legal standard in adjudicating Thomas' attempt to pierce Tru-Tech's corporate veil.[14] The district court relied upon a federal

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[14] Peacock argues that the doctrine of piercing the corporate veil has no place in ERISA actions at all. He argues that, wherever the corporate veil should be pierced so that a shareholder will be subject to the ERISA fiduciary liability of its corporation, ERISA, standing alone, should allow the shareholder to be sued as a fiduciary; piercing the corporate veil, he argues, adds nothing to ERISA, but "results [only] in an uncomfortable inconsistency: the imposition of liability on an individual who previously had been adjudged not to be a fiduciary and hence not to have any liability under ERISA's statutory scheme." Appellant's Br. 23.

We disagree. The tests for ERISA fiduciary liability and veil-piercing are not identical, especially where, as here, most of the activity leading to the conclusion of veil-piercing occurs *after* the activity pursuant to which the corporation is deemed to have breached its ERISA fiduciary duties.

Peacock also argues that *res judicata* should bar Thomas' claim here. Thomas, Peacock argues, could and should have brought his piercing claim at the same time as his ERISA claim. The record does not provide the support necessary to this argument, however:

common law rule for piercing the corporate veil in ERISA cases. Peacock argues that the Supreme Court's decision in *Mackey* forecloses the existence of a federal common law veil-piercing rule in ERISA actions. We disagree. The *Mackey* Court held that "ERISA does not provide an enforcement mechanism for collecting judgments won in" suits brought by plan beneficiaries, pursuant to ERISA § 502(a)(1)(B), (d), 29 U.S.C. § 1132(a)(1)(B), (d), against ERISA benefit plans. Even assuming, *arguendo,* that ERISA also does not provide an enforcement mechanism for collecting judgments won in suits brought by plan beneficiaries, pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), such as the initial litigation won by plaintiffs,[15] *Mackey* would only preclude a federal common law veil-piercing rule in ERISA actions to the extent that an attempt to pierce the corporate veil is merely an enforcement mechanism for collecting a judgment. It would be error, however, as we discuss above in Section III, to characterize the doctrine of piercing the corporate veil as a mere judgment enforcement mechanism. Because a rule of veil-piercing determines *who* is liable for breaches of ERISA fiduciary duties, we believe that ERISA preempts any state law of veil-piercing. *See* ERISA § 514(a), 29 U.S.C. § 1144(a); 1 Fletcher, *supra,* § 41.90, at 91 (Supp.1993) ("In disputes involving workers' claims to ERISA benefits, a federal court may apply a federal common law standard of corporate separateness.").

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most of the transactions relied upon by Judge Traxler in piercing the corporate veil did not occur until *after* completion of the initial ERISA litigation.

[15] ERISA § 502(a)(2) allows for "[a] civil action [to] be brought . . . by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." 29 U.S.C. § 1132(a)(2). ERISA § 409, 29 U.S.C. § 1109, in turn, imposes liability upon plan fiduciaries who breach their fiduciary duties. Plaintiffs, in the initial litigation, were successful in establishing, pursuant to ERISA § 409, 29 U.S.C. § 1109, that Tru-Tech was a fiduciary of the benefit plan it had established, and that Tru-Tech had breached its fiduciary duties.

Having concluded that the determination of whether to pierce the corporate veil in an ERISA action is made under federal law, we turn to what standard the federal veil-piercing rule adopts. *See Phoenix Mut. Life Ins. Co. v. Adams,* 30 F.3d 554, 563-64 (4th Cir.1994). The First Circuit in *Alman v. Danin,* 801 F.2d 1, 3-4 (1st Cir.1986), explained:

> There is no litmus test in the federal courts governing when to disregard corporate form. The Supreme Court has, however, provided some guidance, stating that "the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas Co.,* 306 U.S. 307, 322, 59 S.Ct. 543, 550, 83 L.Ed. 669 (1939). The Court has further indicated that corporate form may not defeat overriding federal legislative policies. *See First National City Bank v. Banco Para el Comercio Exterior de Cuba,* 462 U.S. 611, 630, 103 S.Ct. 2591, 2602, 77 L.Ed.2d 46 (1983); *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co.,* 417 U.S. 703, 713, 94 S.Ct. 2578, 2584, 41 L.Ed.2d 418 (1974). This court has said,
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> > The general rule adopted in the federal cases is that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity," [citing *Capital Telephone Co. v. FCC,* 498 F.2d 734, 738 (D.C.Cir.1974)]. In applying this rule, federal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form [citations omitted], an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine. . . .
>
> *Town of Brookline v. Gorsuch,* 667 F.2d 215, 221 (1st Cir.1981).

ERISA, the statute sought to be enforced here, cannot be said to attach great weight to corporate form. Indeed, deferring too readily to the corporate identity may run contrary to the explicit purposes of the Act. Congress enacted ERISA in part because many employees were being deprived of anticipated benefits, which not only reduced the financial resources of individual employees and their dependents but also undermined the stability of industrial relations generally. *See* 29 U.S.C. § 1001 (1982) (statement of congressional findings and declaration of policy); H.Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Ad. News 4639, 4670, 4676. Allowing the shareholders of a marginal corporation to invoke the corporate shield in circumstances where it is inequitable for them to do so and thereby avoid financial obligations to employee benefit plans, would seem to be precisely the type of conduct Congress would want to prevent.

801 F.2d at 3-4. Several other circuits have followed similar reasoning. *Ellison v. Shenango Inc. Pension Bd. v. Snyder*, 956 F.2d 1268, 1274-75 (3d Cir.1992); *Janowski v. International Bhd. of Teamsters Local No. 710 Pension Fund*, 673 F.2d 931, 941 (7th Cir.1982), *vacated on other grounds*, 463 U.S. 1222, 103 S.Ct. 3565, 77 L.Ed.2d 1406 (1983); *see NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1052 (10th Cir.1993) (interpreting federal rule to allow veil piercing only where "(i) . . . there [was] such unity of interest and lack of respect given to the separate identity of the corporation by its shareholders that the personalities and assets of the corporation and the individual are indistinct and (ii) . . . adherence to the corporate fiction [would] sanction a fraud, promote injustice, or lead to an evasion of legal obligations"). We, too, find this reasoning persuasive [16]

[16] We note that this federal common law veil-piercing rule accords with our understanding of the South Carolina rule, as expounded

and, accordingly, adopt the liberal veil-piercing standard enunciated by the First Circuit in *Alman* for use in ERISA actions. As a consequence, we conclude that the district court applied the correct legal standard in evaluating the plaintiff class' effort to pierce Tru-Tech's corporate veil.

in our opinion in *DeWitt Truck Brokers, Inc. v. W. Kay Flemming Fruit Co.*, 540 F.2d 681 (4th Cir.1976). There, we explained that the "concept of [the corporation as a] separate entity is merely a legal theory . . . and the courts 'decline to recognize [it] whenever recognition of the corporate form would extend the principle of incorporation beyond its legitimate purposes and [would] produce injustices or inequitable consequences.'" *Id.* at 683 (footnote omitted) (quoting *Krivo Indus. Supply Co. v. National Distillers and Chem. Corp.*, 483 F.2d 1098, 1106 (5th Cir.1973), *modified*, 490 F.2d 916 (1974)). We proceeded to stress that "proof of plain fraud is not a necessary element in a finding to disregard the corporate entity," *id.* at 684, and that "courts have experienced 'little difficulty' and have shown no hesitancy in applying what is described as the 'alter ego' or 'instrumentality' theory in order to cast aside the corporate shield and to fasten liability on the individual stockholder," *id.* at 685 (quoting *Iron City Sand & Gravel Div. of McDonough Co. v. West Fork Towing Corp.*, 298 F.Supp. 1091, 1098 (N.D.W.Va.1969), *rev'd on other grounds*, 440 F.2d 958 (4th Cir. 1971)). Thus, while the federal veil-piercing test may "usually give[] less respect to the corporate form than does the strict common law alter ego doctrine," *Town of Brookline*, 667 F.2d at 221, the South Carolina doctrine of veil-piercing accords with the ERISA veil-piercing standard announced in *Alman*. *Compare Perpetual Real Estate Servs., Inc. v. Michaelson Properties, Inc.*, 974 F.2d 545, 549 (4th Cir.1992) (noting that the standard we set out in *DeWitt* is "not the law in Virginia," which sets more stringent standards for piercing the corporate veil).

In light of the foregoing, we observe that, to the extent that, "[w]hile the veil piercing inquiry in an ERISA case is . . . rooted in federal law, state is not rendered completely irrelevant," *United Elec., Radio and Machine Workers of America v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1092 n. 12 (1st Cir.1992), and that, in "apply[ing] federal substantive law, . . . we may look to state law for guidance," *Laborers Clean-Up Contract Administration Trust Fund v. Uriarte Clean-Up Service, Inc.*, 736 F.2d 516, 523 (9th Cir.1984), the federal standard we apply accords with South Carolina veil-piercing law.

VI.

Peacock next argues that, on the facts presented, the district court erred in concluding that Tru-Tech's corporate veil should be pierced. We disagree. The district court found, as matters of fact, that Peacock owned a controlling (and, at most relevant times, a complete) interest in Tru-Tech and, from March of 1988 until its liquidation, served as Tru-Tech's sole director; that PW & C hired Blackburn to wind down Tru-Tech's business and, in turn, billed Tru-Tech $10,000 a month for financial services, and also for incidental expenses; and that numerous transfers were effected among Tru-Tech, PW & C, Peacock and others without proper consideration or formalities. On the basis of these facts and others set out above, the court further found that Peacock engaged in a "corporate strategy" with "the specific intent and purpose . . . [of] siphon[ing] off [Tru-Tech's] assets to favored creditors owned or controlled by Peacock and to defeat collection of the *Thomas* judgment." 1992 U.S. Dist. LEXIS 18749, at *19. On the record before us, we cannot characterize these findings of fact as clearly erroneous.

We also review the district court's decision to pierce Tru-Tech's corporate veil under the clearly erroneous standard. *DeWitt Truck Brokers, Inc., supra,* 540 F.2d at 684; *accord Laborers Clean-Up Contract Administration Trust Fund v. Uriarte Clean-Up Service, Inc.,* 736 F.2d 516, 523 (9th Cir.1984) (reviewing, under the clearly erroneous standard, the district court's decision in an ERISA case to pierce the corporate veil). Under that limited standard of review, the district court's decision will not be disturbed.

Peacock's remaining arguments against the district court's judgment regarding the imposition against him of the Tru-Tech ERISA liability established in the initial litigation are without merit. We consequently affirm the district court's judgment in that regard.

VII.

Following the determination by the district court in the initial litigation that Tru-Tech was liable while Peacock was not, District Judge G. Ross Anderson, Jr., entered an order allowing plaintiffs to defer any motion for attorneys' fees until final disposition of the initial litigation. Because of the appeal of the initial litigation and the subsequent attempt to pierce Tru-Tech's corporate veil, such a motion was not made until the instant litigation was complete in the district court. At that time, District Judge William B. Traxler, Jr., referred the matter back to Judge Anderson for determination of fees arising out of the initial litigation. Judge Anderson applied the five-factor test enunciated in *Reinking v. Philadelphia American Life Insurance Co.,* 910 F.2d 1210, 1217-18 (4th Cir.1990), to determine whether a fee award was appropriate, and, finding that one was, the twelve-factor test adopted in *Barber v. Kimbrell's, Inc.,* 577 F.2d 216, 226 & n. 28 (4th Cir.), *cert. denied,* 439 U.S. 934, 99 S.Ct. 329, 58 L.Ed.2d 330 (1978), to fix the amount thereof. Ultimately, Judge Anderson decided that a fee of $123,181.25 was reasonable, along with costs of $13,103.60. Judge Traxler undertook a similar inquiry and analysis with respect to fees arising out of the veil-piercing litigation, concluding that $64,406.25 in attorneys' fees and $4,490.91 in costs were due. Thus, a total of $205,182.01 in attorneys' fees and expenses were assessed against Peacock. This, we note as a preliminary matter, exceeds the total damages assessed in this case. Peacock argues both that it was inappropriate for the district court to award attorneys' fees in this case and that, even if such an award was appropriate, the amount of the award was excessive. We reject Peacock's first argument but find his second argument persuasive.

In keeping with ERISA § 502(g)(1)'s explicit grant of discretion to the district courts to award "a reasonable attorney's fee," 29 U.S.C. § 1132(g), we review the dis-

trict court's decision to award attorneys' fees solely for abuse of discretion, *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1028 (4th Cir.1993) (en banc). Peacock argues that, because the initial litigation resulted in his exoneration, any award of attorneys' fees is unjust here. The truly culpable party, Peacock suggests, is Tru-Tech. Because this argument ignores the district court's finding that Peacock was Tru-Tech's alter ego and was, himself, culpable for siphoning off Tru-Tech's funds, we reject it and find no abuse of discretion in the district court's decisions to award attorneys' fees arising out of both stages of litigation in this case.

Of far greater weight is Peacock's challenge to the *amount* of the fee awards announced by the district judges. Factor eight of the procedure established in *Barber v. Kimbrell's, Inc.*, for fixing the amount of an attorneys' fee award is "the amount in controversy and the results obtained." 577 F.2d at 226 n. 28. This is "the most critical factor," in such an analysis. *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983). Yet, although the fee award for the initial litigation amounts to more than two-thirds of the total award resulting from that litigation, the district court, in its discussion of "the most critical factor" in the *Barber* analysis focused on the result and the tenacity of the attorneys without mentioning the size of the proposed attorneys' fee and costs award in comparison with the total damage award.[17] A subsequent discussion in the district court's opinion justifies the disproportionate award by citation to cases discussing fee awards in the context of civil rights actions, and by asserting that the policies underlying ERISA are equally strong. This justification is without basis in law. We think it safe to say, without belittling the important interests which ERISA serves to

[17] Nor did the district court discuss the size of the fee award in the context of another *Barber* factor, the attorneys' reasonable expectations at the outset of the litigation.

protect, that the federal civil rights laws provide more vital protections and vindicate far more important interests. *Cf. Quesinberry*, 987 F.2d at 1030 (noting Congress' decision not to implement, in the ERISA context, "a mandatory fee shifting rule analogous to 42 U.S.C. § 1988"). As the Fifth Circuit has explained:

> The policies underlying ERISA are certainly important ones, but they simply do not rise to the level of assuring that all citizens are accorded their civil rights. Not only are the policies that [ERISA] is designed to enforce less compelling than those furthered by [the civil rights laws], but the need for attorneys' fees as an enforcement incentive is less under ERISA than the . . . civil rights statutes. Plaintiffs suing under the [civil rights laws] are "private attorneys general" in the sense that they seek injunctive relief to vindicate important public rights. If such "plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." [*Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968)]. Plaintiffs under Title I of ERISA may be seeking injunctive relief for the benefit of all the participants and beneficiaries of a particular plan. but they may also be seeking damages on behalf of their plan or simply the recovery of benefits from the plan that are due them alone. Fiduciaries, moreover, may have a statutory obligation to bring ERISA suits. Thus, incentives in the form of attorneys' fees are, on the whole, less necessary to insure that the statute is enforced.

Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1265-66 (5th Cir.1980) (footnotes omitted); *accord Ellison v. Shenango Inc. Pension Bd. v. Snyder*, 956 F.2d 1268, 1274-75 (3d Cir.1992); *Janowski v. International Bhd. of Teamsters Local No. 710 Pension Fund*, 673 F.2d

931, 941 (7th Cir.1982), *vacated on other grounds,* 463 U.S. 1222, 103 S.Ct. 3565, 77 L.Ed.2d 1406 (1983). We agree with the position taken by other circuits in this regard. We therefore vacate the attorneys' fees determination entered by the district court with regard to the initial litigation.[18] On remand, the district court should recalculate, in a manner consistent with this opinion, the amount of attorneys' fees.

With respect to the district court's assessment of attorney' fees with regard to the instant attempt to pierce Tru-Tech's corporate veil, Peacock claims that the district court erred in failing to address whether any portion of the total hours spent by the plaintiff's attorneys was devoted solely to plaintiffs' case against Finegold, which, as opposed to plaintiffs' case against Peacock, was not successful. We disagree. It is true that "no fees should be awarded for time spent on unsuccessful claims that were unrelated to successful ones." *Abshire v. Walls,* 830 F.2d 1277, 1282 (4th Cir.1987). Where, however, the facts of an unsuccessful claim are "inextricably intertwined" with those of a successful claim, fees for total time spent are appropriately awarded because both claims required investigation of a "common core of facts." Here, given Finegold's relationship to Peacock and his role in Peacock's and Tru-Tech's transactions, and the nature of the claims raised against Finegold, we conclude that the facts underlying all of the plaintiffs' claims in this litigation were "inextricably intertwined."

Peacock also raises several specific objections to the district court's assessment of attorneys' fees as to both phases of the litigation herein. First, Peacock cites numerous examples where the court, in assessing attorneys' fees with respect to both phases of litigation, awarded fees to cover the presence of both of plaintiffs' primary lawyers even though, Peacock claims, the presence of only one would have sufficed. *See Goodwin v. Metts,* 973 F.2d 378, 383-85 (4th Cir.1992). Second, Peacock claims that the district court awarded items of "cost" which do not fall within the definition of the term at 28 U.S.C. § 1920. Last, Peacock describes as excessive the time plaintiffs' counsel claim to have spent in preparing their fee petitions for submission to the district court and in performing unspecified tasks since the victory against Peacock in the veil-piercing phase of this case.

[18] We also note that the district court, in assessing attorneys' fees with respect to the initial litigation, made reference to plaintiffs' counsel's success in piercing Tru-Tech's corporate veil in the instant litigation. This was error. In proceeding under the "results obtained" factor in determining an appropriate fee award for the initial litigation, the district court should confine its consideration to the "results obtained" in that litigation.

The district judges' orders herein reveal no examination of the objections described above. While we acknowledge the great deference we afford district courts in assessing the proper amount of attorneys' fees and costs, *Goodwin,* 973 F.2d at 385, where a party raises specific objections to particular fees or items of cost, we believe it appropriate for the district court, in the first instance, to address such objections and make appropriate factual finding in order that we might arrive at an informed review of the district court's decision. *See Joseph A. by Wolfe v. New Mexico Dep't of Human Servs.,* 28 F.3d 1056, 1060-61 (10th Cir.1994).

VIII.

We affirm the district court's judgment allowing the plaintiff class to pierce Tru-Tech's corporate veil and recover the damages assessed in the initial litigation from Peacock. While we affirm the district court's decision to allow the plaintiff class to recover the attorneys' fees it incurred in maintaining both the initial litigation and the instant litigation, we vacate the amounts of attorneys' fees and costs assessed by the district court and remand for recalculation consistent with this opinion.

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

APPENDIX B

[Filed and Entered Oct. 28, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

C/A No. 7:91-3843-21

JACK L. THOMAS, Individually and on Behalf of the Tru-Tech, Inc. Pension Plan, and as a Representative of a Class of Plaintiffs Similarly Situated,

Plaintiff,

vs.

D. GRANT PEACOCK and ALAN H. FINEGOLD,

Defendants.

ORDER

This matter is before the court as a nonjury trial. I find for the Plaintiff against D. Grant Peacock. I do not find for the Plaintiff against Alan H. Finegold.

Background of the Case

In 1987 the Plaintiff ("Thomas") brought an action in United States District Court in South Carolina on behalf of himself and other employees of Tru-Tech, Inc. ("Tru-Tech") seeking payment of pension benefits under the Tru-Tech, Inc. Pension Plan ("the Pension Plan"). *Thomas v. Tru-Tech, Inc.*, No. 7:87-2243-3 (D.S.C. 1988). In that action, Thomas asserted numerous causes of action, including breach of fiduciary duty under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.* (1982). The substance of

Thomas' claim was that he and others were entitled to pension benefits under an amendment to the Pension Plan.

In November 1988, the district court ruled that Thomas was entitled to benefits and further held that Tru-Tech, as a fiduciary of the Pension Plan, was liable to Thomas under ERISA for breach of its fiduciary duty in the amount of $187,628.93. The case was appealed to the Fourth Circuit Court of Appeals which, in April 1990 affirmed in all respects the lower court's decision and left intact Thomas' judgment against Tru-Tech. *See Thomas v. Tru-Tech, Inc.*, 900 F.2d 256 (4th Cir. 1990) (table only; text available on Westlaw).

Following the decision by the Fourth Circuit, Thomas attempted to some extent to collect the judgment from Tru-Tech, but was unsuccessful. Thomas then brought the present suit against D. Grant Peacock ("Peacock"), individually, and Peacock's attorney, Alan H. Finegold ("Finegold"), on theories of civil conspiracy, fraudulent transfer of assets, and corporate veil piercing under ERISA and applicable federal law. Thomas alleged Peacock and Finegold conspired to improperly channel Tru-Tech's assets in order to defeat Thomas' claim as a judgment creditor. In addition, Thomas alleged that Peacock's control over Tru-Tech's affairs was such that Tru-Tech was a mere "alter ego" of Peacock himself and that Tru-Tech's disregard for corporate formalities justified piercing the corporate veil in order to secure satisfaction of the $187,628.93 *Thomas* judgment.

Findings of Fact

Tru-Tech was organized in 1981 as a Delaware corporation to purchase a textile machinery parts manufacturing business from the Draper division of Rockwell International. Financing for the two plants, located in Marion, South Carolina, and Beebe River, New Hampshire, was arranged through a group of investors from Pittsburgh, Pennsylvania. Grant Peacock was one of these

investors. A partnership named Marion Limited Partners was established for the purpose of purchasing the Marion, South Carolina, plant from Rockwell International and leasing it to Tru-Tech. An office was placed in Spartanburg, South Carolina.

The promoters and founders of Tru-Tech expected the business to derive substantial revenue primarily from two sources. First, they expected to continue supplying parts to Rockwell's Draper Division which manufactured looms. Second, they believed that Tru-Tech had purchased the tooling for Draper parts and that they could sell these parts on the open market. Unfortunately, their expectations did not come to fruition and the business failed.

Despite the general sluggishness in the textile industry at the time, the demise of Tru-Tech can be attributed to two events that occurred simultaneously. First, within six months of Tru-Tech's purchase of Rockwell's Draper parts manufacturing business, Rockwell sold its Draper Division to another group of investors who immediately reduced inventories, thus severely reducing orders Tru-Tech expected to fill. Second, the "new" Draper filed suit against Tru-Tech alleging that Draper, not Tru-Tech, had the tooling rights for Draper parts. It was determined subsequently that Draper had in fact retained these rights, and it was at this point that Tru-Tech's potential for profit was eliminated.

By September of 1983, Tru-Tech had lost a substantial sum of money and Bill W. Wilcock, Tru-Tech's president and chief executive officer, was terminated and replaced by John H. Blackburn, Tru-Tech's Vice President of Operations. The Spartanburg office was closed. Since Tru-Tech continued to lose money, it became Blackburn's responsibility to liquidate Tru-Tech's assets.

During the latter half of 1985 and early 1986, Tru-Tech managed to sell all of its productive assets in South Carolina. Although the lease between Marion Limited

Partners and Tru-Tech did not expire until the fall of 1986, Tru-Tech quit paying rent in February of 1986. Operations at the Beebe River Plant in New Hampshire ceased in June of 1986. While Tru-Tech maintained assets at this plant, management sought to liquidate the assets to reduce its financial liabilities. Tru-Tech's negative net worth increased from $893,676.00 on September 30, 1986, to $1,376,888.00 on September 30, 1990, thus evidencing the fact that Tru-Tech continued to lose money. Among the liabilites owed by Tru-Tech were the amount of Thomas' judgment, approximately $50,000.00 owed to Grant Peacock & Co., approximately $350,000.00 owed to Peacock individually, and several other large outstanding debts.

D. Grant Peacock was the sole stockholder and director of Peacock, Williams & Company, formerly D. Grant Peacock & Company. He also ended up serving as the sole director of Tru-Tech from March of 1988 until its liquidation. Peacock owned controlling interest in Tru-Tech prior to the sale of 724,980 shares to Timothy H. Williams and John H. Blackburn for $200.[1] Peacock was a CPA and a lawyer who also served as a partner in Marion Limited Partnership.

Following discontinuation of the operations of Tru-Tech, Peacock testified that John H. Blackburn was "placed on the payroll of Peacock, Williams" for the purpose of handling the wrap-up of Tru-Tech in July 1986. For this service and for the service of operating out of Peacock's office in Pittsburgh, Peacock, Williams & Company billed Tru-Tech $10,000 per month for "financial consulting services," generating a large receivable on the books of Tru-Tech in excess of $110,000. However, according to an August 3, 1989, memo to Timothy H. Williams, with a copy to Peacock and Jack Blackburn, "The

[1] Although the stock certificates are dated December 10, 1988, they were forwarded by Grant Peacock to John Blackburn for his signature as president of Tru-Tech on April 4, 1990.

Peacock, Williams books contain[ed] no receivable from Tru-Tech because the management fee receivable of approximately $110,000 was written off in the year ended January 31, 1987." During the entire period from November 1, 1986, through October 31, 1988, Peacock, Williams & Company billed Tru-Tech for such incidental expenses as telephone bills, travel, entertainment, legal fees, UPS, Federal Express, office supplies, Xerox, postage, and petty cash. Peacock testified that during this period no accounting records were kept for Tru-Tech "since it had no employees."

On November 28, 1988, the Plaintiff obtained the judgment from the district court against Tru-Tech. An appeal was taken immediately thereafter. After obvious discussions with Peacock concerning the *Thomas* judgment, Finegold wrote Peacock on March 2, 1989, stating in part as follows:

> I see no reason for any payment with regard to the Thomas litigation unless and until the judgment becomes final and constitutes a lien on real estate held for sale. As I understand the situation, the corporation owns no real estate in South Carolina and the plaintiffs have made no effort to attach the corporation's property in New Hampshire at this time. It remains quite desirable then, to effect the disposition, for acceptable consideration, of the New Hampshire realty before the plaintiffs attempt to reach it. You will need, nevertheless, to pay any legal fees owed to Tru-Tech, Inc.'s counsel in the Thomas case in order to keep them involved in the appeal process.

In the same letter, it was suggested to Peacock "in order to protect the real estate against any claims in the Thomas case and to preserve some possibility of recovery of some portion of the amounts owed to you and your corporation" that Peacock consider an elaborate scheme under which a new corporation would be formed in New Hampshire for the purpose of receiving a transfer of the

Tru-Tech real estate. Recognizing that "the possibility exists of treatment of the transfer as a voidable preference," Finegold nonetheless advised that "the arrangement suggested allows you and Peacock, Williams & Company to recover $130,000 if the new corporation eventually succeeds in consummating the sale of the premises."

Following more discussions with Peacock, on March 13, 1989, Finegold wrote to Peacock "as a consequence of our meeting this past Monday with respect to Tru-Tech, Inc.," to point out "the various matters on which we had settled as a strategy," including:

> (3) The corporation will refrain, for the time being, from payment of any obligations arising out of the Thomas litigation, pending further developments on this front.
>
> . . . .
>
> (7) The corporation will, with the use of its receivables, pay down the amounts owed to Peacock, Williams & Company and to you, personally, in order to start running the one year period for avoidance of preferences to control persons in bankruptcy.

Following this exchange of correspondence, on a Tru-Tech Proforma Balance Sheet dated June 26, 1989, Peacock indicated in his own handwriting that the note receivable shown on the books of Tru-Tech as the "Brodsky Note" with a value of $47,000 should be transferred to Peacock, Williams & Company and that Tru-Tech should "forget" the $187,628.93 *Thomas* judgment carried as a liability on the Tru-Tech balance sheet together with estimated interest on the judgment of $12,000 and estimated Plaintiff's attorneys' fees of $50,000. It is also worthy of note that this same document shows that the asserted consideration for this preferential transfer of the Brodsky Note to Peacock, Williams & Company was the same management fee for "financial consulting services" which were written off on the books of Peacock, Williams & Company in the year ending January 31, 1987.

According to this "strategy," Peacock, who by then was sole director of Tru-Tech, executed a written consent of the Tru-Tech Board of Directors dated July 1, 1989, authorizing the Brodsky Note to be transferred to Peacock, Williams & Company "for accounts payable owed by Tru-Tech to Peacock, Williams," and the assignment of the Brodsky Note was executed by John H. Blackburn as president of Tru-Tech on October 20, 1989. Blackburn was then operating out of Peacock's office in Pittsburgh. However, although the transfer date of the Brodsky Note is shown in Tru-Tech's general ledger with a transaction date of July 31, 1989, a typed list of accounts payable for Tru-Tech dated April 19, 1990, still shows a total of $111,706 payable to Grant Peacock & Company with a handwritten entry questioning whether the $40,000 Brodsky Note should be deducted.

In addition to the Brodsky Note, deposition exhibits identified by Peacock and Finegold indicate that a note receivable known as the "Uhlman Note" was transferred to Finegold and Nancy B. Peacock. The authorization for this transfer, signed by D. Grant Peacock as sole director of Tru-Tech, is dated October 31, 1988, and Finegold testified in his deposition that a check should have been issued to Tru-Tech "more or less" at the same time:

> Q. And the check would have been at the same time as far as you know?
>
> A. I assume more or less. Whether it was on the exact same day that the note was signed, I don't know.

The date of the transfer and payment of consideration is important because, if the authorization was actually executed on the date shown in Plaintiff's Deposition Exhibit # 7, this transfer would have taken place on October 31, 1988, twenty-eight days prior to the entry of the *Thomas* judgment against Tru-Tech. Finegold testified that "Mr. Peacock contacted me and indicated to me that

Tru-Tech, Inc., had as one its assets this particular note" and that Tru-Tech "was badly in need of funds that it could use to pay certain obligations and that it wished to sell this note for cash." However, the actual "transaction date" shown on the general ledger of Tru-Tech for the transfer of the Uhlman Note is May 31, 1989. In addition, Thomas introduced as Exhibit # 31 a letter from Finegold dated April 3, 1989, the first paragraph of which states:

> Pursuant to your request, I have signed and enclosed herewith, in my capacity as trustee of the D. Grant Peacock Trust for Nancy B. Peacock u/a dated December 26, 1985, two checks payable to the order of Tru-Tech in the aggregate amount of $27,235.08 constituting the purchase price of the Uhlman note, including interest accrued through same date.

This same letter requests that Peacock furnish Finegold "a copy of the so-called Uhlman note" and "a schedule showing the application by Tru-Tech of the $27,235.08 paid, an application which, I assume, involves some favored creditors like Peacock, Williams & Company, Incorporated."

Thus, the evidence is that there was either no consideration paid for the assignment of the Uhlman Note on October 31, 1988, or the assignment was simply backdated to reflect that as the supposed date of transfer. In addition, the court finds that the purpose of the sale of the Uhlman Note was to get enough cash into Tru-Tech to pay the $25,000 retainer to Greenville attorney David L. Freeman for the purpose of handling the appeal of the *Thomas* judgment.[2] Deposition exhibits identified by Peacock indicate that reports on the progress of the *Thomas* litigation were made by Freeman to John H. Blackburn as senior vice-president of Peacock, Williams &

[2] According to a pencil entry on the Tru-Tech accounts payable list of July 31, 1989, the $25,000 retainer appears to have been paid on June 2, 1989.

Company and that Freeman's bill for handling the appeal was sent, not to Tru-Tech, but to Peacock himself and to Grant Peacock & Company.[3]

In addition to these transfers, Tru-Tech also transferred a receivable from Marion Limited Partners, in which Peacock was a partner, in the amount of $5,737.75 to Peacock, Williams & Company on November 1, 1989, together with a $5,000 note on May 4, 1990.[4] There is further evidence that Peacock was the "alter ego" of Tru-Tech in a memorandum dated November 2, 1989, which stated:

> On September 30, 1987, Tru-Tech, Inc., shows a payable to Peacock Williams of $31,804. Tru-Tech also shows a receivable from Marion Limited Partners for $37,541.75.
>
> On April 30, 1988, the two amounts were netted on Tru-Tech's books lowering the receivable from Marion Limited Partners to $5,737.75 and the amount due tc Peacock, Williams to zero.
>
> Marion Limited Partners and Peacock, Williams should now reflect this change. Marion Limited Partners now owes Peacock, Williams $31,804.[5]

Peacock continued to act as the "alter ego" of Tru-Tech even after his purported resignation as a director

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[3] Freeman's letter of January 6, 1989, enclosing his $25,000 "retainer statement" was sent directly to D. Grant Peacock of D. Grant Peacock and Company, and the invoice itself is directed to Grant Peacock & Company, Inc.

[4] This transfer was pursuant to what Peacock called "a floating authorization," and the assignment was executed by Timothy H. Williams as executive vice-president of Tru-Tech on May 4, 1990, four days after he resigned as an officer of Tru-Tech on May 1, 1990.

[5] This remaining Tru-Tech receivable of $5,737.75 was subsequently transferred to Peacock Williams & Company on November 1, 1989.

on February 15, 1990. On March 6, 1990, Finegold forwarded him "for signature in connection with the withdrawal of Tru-Tech, Inc., from the State of New Hampshire," a letter to the State of New Hampshire "apparently required for completion of this process." Finegold continued to bill Peacock for delinquent legal services accounts of Tru-Tech through May of 1990, and Peacock continued to sign checks for legal fees on the bank account of Tru-Tech, including a $249.91 check dated May 29, 1990, and a check for $1,057.16 dated May 31, 1990. However, although Finegold had no problem in getting Peacock to sign Tru-Tech checks in payment of Finegold's legal fees after Peacock had resigned as a director, on August 30, 1990, Finegold wrote to Donald L. Phillips, a Pittsburgh attorney hired by Thomas to undertake supplemental proceedings in Pennsylvania, stating in part as follows:

> Apparently, a problem exists in furnishing answers to those interrogatories; for at present, as I understand the situation, Tru-Tech, Inc. . . . has discontinued its businesses, and disposed of all of its fixed assets . . . ; and all of its directors and officers with any detailed knowledge of the businesses and affairs of the corporation have resigned. As a practical matter, then, the corporation is defunct; and there is no one known to Grant Peacock or to me who has the authority and knowledge to prepare the answers demanded to the interrogatories propounded.

Further, with respect to Peacock's credibility, there was no reference to Marion Limited Partners' transfer to Peacock, Williams & Company in Peacock's answers to garnishee interrogatories in the Pennsylvania supplemental proceedings[6] and the evidence reveals the back-dating of the stock certificates from Peacock to Timothy H. Williams

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[6] The interrogatories were signed by Finegold and verified by Peacock.

and John R. Blackburn from April 4, 1990 to December 10, 1988.[7]

Based on the background findings stated above, the court makes the following specific findings of fact:

1. Grant Peacock was the sole shareholder and director of Peacock, Williams & Company, formerly Grant Peacock & Company.

2. From March 1988 until its ultimate dissolution in May of 1990, Peacock was the controlling shareholder and sole director of Tru-Tech. He directed and controlled essentially all of its affairs, including its finances, dictated the disposition of its assets, and ran the company from his own office in Pittsburgh, either directly or through other employees of Peacock, Williams & Company.

3. During the entire period from November 1986 through its ultimate dissolution in May of 1990, there was a failure to observe corporate formalities between Tru-Tech, Grant Peacock, and Peacock, Williams & Company. No dividends were paid, there were no independently functioning officers and directors other than Peacock and those employees of Peacock, Williams & Company dominated by Grant Peacock; there was an absence of many of the corporate records normally found in a functioning corporation, and the corporate shell of Tru-Tech was merely a facade for the operation of the dominant will of Grant Peacock.

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[7] In his deposition, Peacock testified that the reason for this stock transfer had nothing to do with tax considerations. However, Tru-Tech's amended 1988 tax return dated January 5, 1990 states as follows: "This return as originally filed incorrectly indicated that a shareholder owned more than 50% of the stock as of year end. This return is filed to correct the answer to question 1(a) and (b) on the original return." Peacock testified that the stock was issued in September of 1989, but the actual documents show that the stock certificates were not signed until April 1990.

4. During the entire period prior to and after the entry of the *Thomas* judgment against Tru-Tech in November 1988 through its ultimate dissolution in May of 1990, Tru-Tech was and remained insolvent. In contemplation of the *Thomas* judgment and following its entry, Peacock directed the management of Tru-Tech's affairs to defeat the collection of the *Thomas* judgment by siphoning off the assets of the corporation to certain favored creditors owned or controlled by Peacock, including Peacock, Williams & Company and the D. Grant Peacock Trust for Nancy B. Peacock.

5. Included in the assets of Tru-Tech siphoned off by Peacock to certain favored creditors owned or controlled by him were the following:

(a) The Uhlman Note valued at $27,235.

(b) The Brodsky Note valued at $47,000 to $48,000.

(c) The Marion Limited Partners' receivable valued at $5,737.75.

(d) A note transferred to Peacock, Williams & Company in May 1990 valued at $5,000.

6. The stated consideration for the bulk of these transfers was a $110,000 receivable payable to Peacock, Williams & Company primarily for "financial consulting services" billed to Tru-Tech during the time it was dominated and controlled by Peacock and Peacock, Williams & Company. This receivable had been previously written off on the books of Peacock, Williams & Company in January of 1987. The remaining consideration for these transfers was a cash payment from the D. Grant Peacock Trust for Nancy B. Peacock, the apparent purpose of which was to pay the retainer charged by Greenville attorney David Freeman to Peacock and Grant Peacock & Company for handling the appeal of the *Thomas* judgment.

7. These assets of Tru-Tech were siphoned off by Peacock pursuant to a corporate strategy developed by him. It was the specific intent and purpose of this strategy to siphon off these assets to favored creditors owned or controlled by Peacock and to defeat collection of the *Thomas* judgment.

8. There was a significant intermingling of funds as well as overlap of administrative personnel between Tru-Tech and Peacock, Williams & Company. As a result of these and other actions of Peacock as the dominant shareholder and director, Tru-Tech failed to observe traditional corporate formalities.

9. In his efforts to siphon off the assets of Tru-Tech to favored creditors owned or controlled by Peacock, it was the specific intent of Peacock to defraud the former employees of Tru-Tech who were beneficiaries of the Pension Plan and to defeat their legitimate attempt to collect a lawful judgment.

10. The corporate form of Tru-Tech during the period of November 1986 through its ultimate dissolution in May of 1990, and even following that date, was a mere facade, and during that period Tru-Tech was nothing more than the "alter ego" of Peacock and an instrumentality dominated and controlled by him.

11. Under the facts of this case and in light of the clear legislative purpose of ERISA, it would be inequitable and unfair to allow Tru-Tech's corporate form to be misused for the purpose of depriving its employees of their anticipated benefits and of avoiding lawful financial obligations to an employee benefit plan under ERISA.

12. The involvement of Finegold was not proven to have exceeded the scope of proper legal representation.

Conclusions of Law

A. *Federal Policy Under ERISA*

The applicable federal policy under ERISA was well stated by the United States Court of Appeals for the First Circuit in *Alman v. Danin*, 801 F.2d 1, 304 (1st Cir. 1986) where the court explained:

> There is no litmus test in the federal courts governing when to disregard corporate form. The Supreme Court has, however, provided some guidance, stating that "the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322, 59 S.Ct. 543, 550, 83 L.Ed. 669 (1939). The Court has further indicated that corporate form may not defeat overriding federal legislative policies. . . . This Court has said,
>
> > The general rule adopted in the federal cases is that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity. . . ." In applying this rule, federal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form . . . , an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine. . . .
>
> . . . .
>
> ERISA, the statute sought to be enforced here, cannot be said to attach great weight to corporate form. Indeed, deferring too readily to the corporate identity may run contrary to the explicit purposes of the Act. Congress enacted ERISA in part because many employees were being deprived of anticipated benefits, which not only reduced the financial resources of individual employees and their dependents but also undermined the stability of industrial relations gen-

> erally. . . . Allowing the shareholders of a marginal corporation to invoke the corporate shield in circumstances where it is inequitable for them to do so and thereby avoid financial obligations to employee benefit plans, would seem to be precisely the type of conduct Congress wanted to prevent.

801 F.2d at 3-4 (citations omitted).

In deciding whether it is appropriate to disregard the corporate form and to impose liability upon the dominant shareholder under the "alter ego" doctrine, the courts have generally focused on the following three factors:

> the small respect paid by the shareholders themselves to [the corporation's] separate corporate entity; the fraudulent intent of the incorporator; and the degree of injustice that would be visited on the litigants by recognizing the corporate identity. Other courts have looked to similar factors where ERISA is involved. . . .[8]

Citing *Alman v. Danin,* with approval, the Seventh Circuit in *Lumpkin v. Envirodyne Industries, Inc.,* 933 F.2d 449, 461 (7th Cir. 1991) stated as follows:

> The underlying congressional policy behind ERISA clearly favors the disregard of the corporate entity in cases where employees are denied their pension benefits. In *Pension Ben. Guaranty Corp. v. Quimet Corp.*, 711 F.2d 1085 (1983), certiorari denied, 464 U.S. 961, 104 S.Ct. 393, 78 L.Ed.2d 337, the First Circuit pierced the corporate veil to impose liability upon the solvent members of a corporation that had declared bankruptcy. The court emphasized that the congressional intent of ERISA is to hold employers

[8] *Alman v. Danin,* 801 F.2d at 4, citing *Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Hroch,* 757 F.2d 184, 190 (8th Cir. 1985); *Laborers Clean-up Contract Administration Trust Fund v. Uriarte Clean-up Service, Inc.,* 736 F.2d 516, 524 (9th Cir. 1984).

> responsible for pension benefits, so that when the corporate form poses a bar to liability, "concerns for corporate separateness are secondary to what we view as the mandate of ERISA." . . . Thus under *Quimet Corp.*, the corporate form chosen by defendant does not necessarily preclude plaintiffs from piercing the corporate veil and suing Envirodyne. If justice would be served and potential fraud nullified then plaintiffs should be able to proceed against the party that had actual control of WSC and EDC.[9]

In *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Company,* 540 F.2d 681 (4th Cir. 1976), the Fourth Circuit described the appropriate considerations in determining whether the corporate veil should be pierced. In an opinion by Judge Donald Russell, the court stated:

> At the outset, it is recognized that a corporation is an entity, separate and distinct from its officers and stockholders, and that its debts are not the individual indebtedness of its stockholders. . . . But this concept of separate entity is merely a legal theory, "introduced for purposes of convenience and to subserve the ends of justice," and the courts "decline to recognize [it] whenever recognition of the corporate form would extend the principle of incorporation 'beyond its legitimate purposes and [would] produce injustices or inequitable consequences.'" . . . . Accordingly, "in an appropriate case and in furtherance of the ends of justice," the corporate veil will be pierced and the corporation and its stockholders "will be treated as identical."

DeWitt Truck Brokers, 540 F.2d at 683.

The Fourth Circuit stressed the "proof of plain fraud is not a necessary element in a finding to disregard the

[9] *Lumpkin v. Envirodyne Industries, Inc.,* 933 F.2d 449, 461 (7th Cir. 1991).

corporate entity" (540 F.2d 684) and "that the mere fact that all or almost all of the corporate stock is owned by one individual or a few individuals, will not afford sufficient grounds for disregarding corporateness. . . ."

> But when substantial ownership of all the stock of a corporation in a single individual is combined with other factors clearly supporting disregard of the corporate fiction on grounds of fundamental equity and fairness, courts have experienced "little difficulty" and have shown no hesitancy in applying what is described as the "alter ego" or "instrumentality" theory in order to cast aside the corporate shield and to fasten liability on the individual stockholder. . . .

DeWitt Truck Brokers, 540 F.2d at 685.

Stating that the piercing of the corporate veil is a question of fact that is "particularly in the province of the trial court" (540 F.2d 684), the Fourth Circuit in *DeWitt Truck Brokers* stated:

> One fact which all the authorities consider significant in the inquiry, and particularly so in the case of the one-man or closely held corporation, is whether the corporation was grossly under-capitalized for the purposes of the corporate undertaking. . . . And [t]he obligation to provide adequate capital begins with incorporation and is a continuing obligation thereafter . . . during the corporation's operations. . . . Other factors that are emphasized in the application of the doctrine are failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning the funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders. . . .

DeWitt Truck Brokers, 540 F.2d at 685-687 (citations omitted).

In accord with these rules, see *Federal Deposit Insurance Corporation v. Sea Pines Company,* 692 F.2d 973 (4th Cir. 1982); *Sturkie v. Sifly,* 280 S.C. 453, 313 S.E.2d 316 (S.C. Ct. App. 1984); *C.T. Lowndes & Coe v. Suburban Gas & Appliance Company,* 415 S.E.2d 404 (S.C. Ct. App. 1991); *Cumberland Wood Products, Inc. v. Bennett,* 1992 W.L. 71171 (S.C. Ct. App. 1992); *Central States v. Minneapolis Van and Warehouse Company,* 746 F. Supp. 1289, 1294-1296 (N.D. Ill. 1991). The general rule is also stated in *Fletcher Cyclopedia of Corporations,* section 41.90, page 715, as follows:

> The federal rule states that a corporate entity may be disregarded in the interest of public convenience, fairness, and equity, and in applying this rule the federal courts will look closely at the purpose of the federal statute involved to determine whether it places importance on corporate form. Under federal common law, the corporate form may be disregarded in the interest of justice where it is used to defeat an overriding public policy. . . .

In *Leddy v. Standard Drywall, Inc.,* 875 F.2d 383, 387-88 (2nd Cir. 1989), the court held that the president and major shareholder of a corporation who conspired with the corporation to defraud pension, welfare, and fringe benefits of their employees was individually liable under ERISA for unpaid contributions even though traditional conditions for piercing the corporate veil were not met. On the issue of individual liability of Gedell, as president and major shareholder of the corporation, the court stated:

> We agree with Gedell that the District Court did not make sufficient findings for a conclusion to pierce the corporate veil under traditional common law principles, nor was there sufficient proof at trial that would support such a conclusion. But this does not absolve Gedell of liability.

Section 515 of ERISA imposes an obligation to make contributions to employee benefit funds on "every employer who is obligated to make contributions . . . under the terms of a collectively bargained agreement." 29 U.S.C. § 1145. The term "employer" is defined as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." 29 U.S.C. § 1002.

. . . .

Gedell was not merely a major shareholder and controlling officer of a company that neglected to make required benefit plan contributions. He and other Standard officials engaged in a criminal conspiracy to defraud the Funds. . . .

. . . .

The Supreme Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies. . . .

. . . .

Shielding from liability a controlling corporate officer who, like Gedell, deliberately flouts ERISA obligations by conspiring to defraud employee pension and welfare plans would surely defeat this legislative purpose. We therefore hold that at least to the extent that a controlling corporate official defrauds or conspires to defraud a benefit fund of required contributions, the official is individually liable under Section 502 of ERISA, 29 U.S.C. § 1132, just as he would be liable for unpaid minimum wages under [the Fair Labor Standards Act], even if the traditional conditions for piercing the corporate veil are not met. . . .

Leddy v. Standard Drywall, 875 F.2d at 387-88.

In *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970, 983 (11th Cir. 1986) the court stated that "because liability

here flows from ERISA, we find it appropriate to follow the Supreme Court's holdings, in cases arising under analogous labor law statutes, that have permitted imposing liability for contempt on a successor or alter ego."

> Accordingly, we affirm the district court's determination that Simmons and Alan's are liable to the Trustees for the unpaid pension funds. The factual support for the trial court's finding, in both respects, is overwhelming. Simmons directed and controlled the finances of both companies, as well as numerous others, and ran the whole lot out of one office. The decision not to pay the obligation under the consent decree was his. During the period when Ryan's was in default of its obligations under the consent decree, Simmons authorized over $60,000 in payments to himself and to other of his wholly owned concerns. . . . Further, there was significant intermingling of funds . . . as well as overlap of administrative personnel. . . . Upon all of this evidence we cannot properly say that the trial court's findings were clearly in error.

Combs v. Ryan's Coal Co., Inc., 785 F.2d at 983.

In *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209 (2d Cir. 1987), the plaintiff-trustees of an ERISA pension plan sued the corporations, and their individual directors, responsible for investing the pension plan's funds. The plaintiffs alleged that the defendants engaged in prohibited transactions because the defendants owned or had an interest in some of the corporations in which the defendants were investing the pension plan's funds. *Id.* at 1212. In affirming summary judgment for the plaintiffs, the Second Circuit held that not only the corporations, but also the individual owners of the corporations, were liable for fiscal mismanagement:

> Neither the separate corporate status of the three corporations nor the general principle of limited share-

> holder liability afford protection where exacting obeisance to the corporate form is inconsistent with ERISA's remedial purposes. Parties may not use shell-game-like maneuvers to shift fiduciary obligations to one legal entity while channeling profits from self-dealing to a separate legal entity under their control.
>
> . . . .
>
> A failure to disregard the corporate form in the circumstances of the present case would fatally undermine ERISA. The record demonstrates beyond dispute extensive intermixing of assets among the corporations, and among the corporations and individual defendants.

Id. at 1220-21.

Lowen and *Alman* particularly demonstrate that federal courts will look to substance over form when allegations of corporate mismanagement or fraud are prosecuted under ERISA. Moreover, the federal courts will hold defendants personally liable for their fraudulent actions. The fact of the matter is that ERISA was enacted to prevent corporate machinations from hindering employee-plaintiffs in securing their benefits. ERISA clearly states this not only in its purpose clause, but also in its legislative history. The courts, therefore, have construed ERISA to have a broad, remedial scope.

B. *Civil Conspiracy*

The elements of a civil conspiracy under South Carolina law are (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiffs, and (3) which causes the plaintiffs special damages. *See LaMotte v. The Punchline of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711, 713 (1988); *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E. 2d 150, 152 (S.C. Ct. App. 1987).

In *Lee v. Chesterfield General Hospital*, 289 S.C. 6, 344 S.E.2d 379 (S.C. Ct. App. 1986), the court explained the distinction between a civil conspiracy and criminal conspiracy as follows:

> A criminal conspiracy consists of "a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object or an object neither criminal nor unlawful by criminal or unlawful means." . . . ("A conspiracy consists . . . in the agreement of two or more to do an unlawful act, or to do a lawful act by unlaw means"). To establish a criminal conspiracy it is not necessary to prove an overt act. The gist of the crime is the unlawful combination. The crime is then complete, even though nothing further is done. . . .
>
> A civil conspiracy, on the other hand, consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. . . . The gravamen of the tort is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se. . . . A civil conspiracy may, of course, be furthered by an unlawful act. . . . However, an unlawful act is not a necessary element of the tort. An action for conspiracy may lie even though no unlawful means are used and no independently unlawful acts are committed.

Lee v. Chesterfield General Hospital, 344 S.E.2d at 381-82 (citations omitted).

C. *Specific Conclusions*

1. The plaintiff has the burden of proof and must establish each and every element of his cause of action by the preponderance of the evidence. This means that the plaintiff must produce evidence which, when consid-

ered in the light of all the facts, leads this court to believe that what the plaintiff claims is more likely true than not.

2. While the doctrine of corporate entity is recognized generally and for most purposes, it will not be regarded when to do so would work fraud or injustice, nor may the corporate form be misused to defeat overriding federal legislative policies.

3. The general rule adopted is that a corporate entity may be disregarded in the interest of public convenience, fairness, and equity. Under the clear legislative purposes of ERISA, the courts do not attach great weight to corporate form when to do so would deprive employees of their anticipated benefits and avoid lawful financial obligations to employee benefit plans.

4. The primary considerations in determining whether to pierce the corporate veil under ERISA are the amount of respect paid by the shareholders themselves to the corporations' separate corporate entity, the fraudulent intent of the dominating shareholder, and the degree of injustice that would be visited on the litigants by recognizing the corporate entity. The underlying congressional policy behind ERISA clearly favors the disregard of the corporate entity in cases where employees are wrongfully denied their pension benefits. The congressional intent of ERISA is to hold employers responsible for pension benefits, so that when the corporate form poses a bar to liability, concerns for corporate separateness are secondary to the mandate of ERISA. If justice would be served and potential fraud nullified, then the beneficiaries of the plans should be able to proceed against the party that has actually exerted dominant control over the corporation.

5. Proof of plain fraud is not a necessary element in a finding to disregard the corporate entity, but when substantial ownership of the stock of a corporation in a single individual is combined with other facts clearly supporting disregard of the corporate fiction on the grounds of fundamental equity and fairness, there should be little difficulty and no hesitancy in applying the alter ego doctrine.

6. The evidence in this case dictates the conclusion that Peacock was the "alter ego" of Tru-Tech and that Tru-Tech was a mere "instrumentality" in his hands.

7. The Plaintiffs have sustained their burden of proof on the "alter ego" theory and are entitled to "pierce the corporate veil" and to recover a judgment against D. Grant Peacock for recovery of their previously rendered judgment for $187,628.93 against Tru-Tech together with interest and attorneys' fees.

8. The Plaintiffs have not sustained their burden of proving the essential elements of a civil conspiracy under South Carolina law, the elements being (a) a combination of two or more persons, (b) for the purpose of injuring the Plaintiffs, and (c) that such combination and conspiracy has caused the Plaintiffs special damages.

9. The Plaintiffs have not sustained their burden of proving liability on the part of Finegold.

THEREFORE, IT IS ORDERED that the Plaintiffs shall have judgment against D. Grant Peacock in the amount of $187,628.93 together with interest at the rate of 8.55% as set forth in the *Thomas* judgment and costs under 29 U.S.C. § 1132(q). Plaintiffs shall have thirty days after the filing of this Order to submit their petitions for attorneys' fees.

IT IS FURTHER ORDERED that the court finds for Alan H. Finegold and no judgment shall be entered against him.

IT IS SO ORDERED.

/s/ William B. Traxler, Jr.
WILLIAM B. TRAXLER, JR.
United States District Judge

Greenville, South Carolina
October 26, 1992.

APPENDIX C

[Filed and Entered Jun. 24, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

C/A NO: 7:91-3843-21

JACK THOMAS, Individually, on behalf of the Tru-Tech, Inc. Pension Plan, and as a Representative of a Class of Plaintiffs similarly situated,

Plaintiffs,

v.

D. GRANT PEACOCK and ALAN H. FINEGOLD,

Defendants.

ORDER

I. INTRODUCTION

The Defendants, D. Grant Peacock ("Peacock") and Alan H. Finegold ("Finegold") have moved the court to dismiss the action pursuant to Fed.R.Civ.P. 12(b)(2), asserting that this court lacks personal jurisdiction over them. Alternatively, Peacock and Finegold, pursuant to Fed.R.Civ.P. 12(b)(3), move to transfer venue of the case to the United States District Court for the Western District of Pennsylvania. Representative Plaintiff Thomas contends, however, that this court may exercise *in personam* jurisdiction over the Defendants because jurisdiction is statutorily conferred under 29 U.S.C. § 1132(e)(2) of "The Employee Retirement Income Security Act" ("ERISA"), 29 U.S.C. § 1001 *et seq.* (1988). Moreover,

the Plaintiff claims that venue of this cause is proper in the District of South Carolina. Having considered the statutory scheme, the Congressional purpose of enacting ERISA, and the relevant caselaw, the court concludes that it may exercise personal jurisdiction over the Defendants and that venue is proper in this district. Accordingly, the court denies the Motion to Dismiss, Or In The Alternative, To Transfer This Action.

II. THE FACTS

The facts giving rise to the present motion originated with an ERISA action by Plaintiff Thomas, representing a similarly situated class of plaintiffs, on August 20, 1987, in the District of South Carolina before the Honorable Judge G. Ross Anderson, Jr. This action was filed by Thomas against Tru-Tech, Incorporated ("Tru-Tech"), Peacock, who was Chairman of the Board of Tru-Tech, Grant Peacock & Company, Incorporated, and Connecticut General Life Insurance Company, for breach of fiduciary duty in failing to fund properly the Tru-Tech Pension Plan. The court held that Thomas and his class were entitled to benefits and that Tru-Tech, a fiduciary of the pension plan, was liable to the Plaintiffs for breach of its fiduciary duties. Accordingly, Plaintiff Thomas and his class prevailed in this action and were awarded a judgment of $187,500.00 in November of 1988. *See Thomas v. Tru-Tech, Inc.*, No. 7:87-2243-3 (D.S.C. 1988). The Fourth Circuit affirmed the district court's judgment. *See Thomas v. Tru-Tech, Inc.*, 900 F.2d 256 (4th Cir. 1990) (unpublished opinion). This judgment remains unsatisfied, and its satisfaction is the impetus for the present action.

Further information is gleaned from the affidavits and memoranda of the parties and the unpublished appellate opinion affirming the earlier action. Tru-Tech was organized as a Delaware corporation in 1981 by Bill Wilcock for the purpose of acquiring a textile machinery parts

business. One of the businesses Tru-Tech acquired was a manufacturing plant in Marion, South Carolina. The other acquired plant was located in Beebe River, New Hampshire. In addition to acquiring a manufacturing plant in South Carolina, Tru-Tech also kept its corporate headquarters and sales offices in Spartanburg, South Carolina, thereby establishing itself in South Carolina and availing itself to South Carolina's jurisdiction. Significantly, the pension plan was administered in South Carolina, which also happens to be the district in which the Plaintiffs reside. Also in 1981, Tru-Tech formed a pension plan for the benefit of its employees. Although the plan stated its effective date was October 1, 1981, the plan was subject to approval by the Internal Revenue Service ("IRS"). The plan, however, was not submitted for approval until December 31, 1982. The IRS, on July 21, 1983, withheld its approval of the plan because its vesting schedule did not comply with the applicable law. The board of directors of Tru-Tech, therefore, on September 14, 1983, amended the plan to correct the defective vesting schedule.

By 1984, however, Tru-Tech was in financial straits. To this end, Tru-Tech's directors notified the IRS that their prior amendment of the vesting schedule was unauthorized and requested the IRS to issue an adverse determination as to the plan, which was issued on January 31, 1985 and became final on May 23, 1985. Accordingly, the plan was terminated; and its assets were refunded to Tru-Tech with interest.

The effective date of this plan was an issue in the earlier proceeding before Judge Anderson. Judge Anderson held that the plan became effective in 1981—the year the plan would have been approved had its vesting schedule been properly calculated by Tru-Tech's directors. The Fourth Circuit affirmed Judge Anderson's ruling, holding that the pension plan was indeed effective in 1981. *See* 900 F.2d 256 (4th Cir. 1990) (unpublished opinion).

By 1986, Tru-Tech had moved most of its operations to Pennsylvania and was no longer transacting business in South Carolina.

In the instant action, Plaintiff Thomas, for his class, is attempting to satisfy the judgment rendered by Judge Anderson in the previous case on the merits of the Plaintiffs' breach of fiduciary duty claim against Tru-Tech, Peacock, and others. In his present Complaint, Plaintiff Thomas alleges that Peacock, with the advice and counsel of Finegold, fraudulently transferred Tru-Tech's assets in an attempt to deprive the Plaintiffs of a *res* that would satisfy their judgment. Specifically, Plaintiff Thomas avers that Peacock and Finegold transferred Tru-Tech's assets to certain favored creditors, some of which are corporate entities allegedly controlled by Peacock. The alleged effect of these preferential transfers is that Tru-Tech is escaping not only the duties it had as a fiduciary of the pension plan, but also the judgment rendered adverse to it by Judge Anderson, whose ruling was affirmed by the United States Court of Appeals for the Fourth Circuit. Thus, the present action is an attempt to satisfy a former judgment properly rendered by the District Court.

III. DISCUSSION

A. *The Purpose of ERISA*

ERISA's broad, remedial scope is squarely established in the opening section of the Act:

> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, *and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.*

29 U.S.C. § 1001(b) (emphasis supplied). Apart from the expressly stated purpose of the Act, the legislative history reveals that ERISA contemplated a liberal interpretation, including liberal provisions for jurisdiction and venue. The House Committee on Education and Labor, reporting on drafts of the Act, stated:

> The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and *to remove jurisdictional and procedural obstacles* which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants. *For actions in federal courts, nationwide service of process is provided in order to remove a possible procedural obstacle to having all proper parties before the court.*

H.R.Rep. No. 93-533, 93rd Cong., 1st Sess., 17 (1973), *reprinted in* 1974 U.S.Code Cong. & Admin.News 4639, 4655 (emphasis supplied). ERISA, therefore, is to be construed liberally.

Like its purpose, ERISA's jurisdictional and venue provisions are sweeping in scope. Specifically, 29 U.S.C. § 1132(e)(2) provides:

> Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

Accordingly, the Act provides for nation-wide service of process. The jurisdictional implications of this national

service of process are the crux of the disputed issue in the present case.

In its Motion to Dismiss or Transfer Venue, the Defendants strenuously urge, pursuant to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny, that they have not established the proverbial "systematic and continuous minimum contacts" with South Carolina, nor have they availed themselves to the courts of the forum state. Therefore, the Defendants claim that this court's exercising *in personam* jurisdiction over them violates the Due Process Clause of the United States Constitution. *See* "Defendant's Motion To Dismiss Or In The Alternative, To Transfer This Action," pp. 9-19. While the Defendants correctly recite due process law and the limitations placed upon state courts, and federal courts sitting in diversity, to exercise jurisdiction over non-resident defendants, that argument is simply misplaced in the present action. Here, jurisdiction is premised upon a federal question, not upon diversity. Thus, the *United States*, not a state, is the sovereign. *International Shoe Co.*, therefore, does not apply; and the Defendants' assertions to the contrary fail in the wake of jurisdiction conferred by statute.

As stated, *International Shoe Co.* applies to the power of state courts and federal courts exercising diversity jurisdiction to extend their power and process beyond the borders of the state in order to compel the presence of non-residents. An *International Shoe Co.* analysis must first determine whether a state long-arm service of process statute exists and then whether ordering the defendant to appear by virtue of the long-arm statute comports with the Constitutional requirements of due process. The second prong of the *International Shoe Co.* analysis is determining whether the non-resident defendant has established "minimum contacts" with the forum state. *See Federal Ins. of America v. Lake Shore, Inc.*, 886 F.2d 654, 657 n.2 (4th Cir. 1989); *Wolf v. Richmond County*

Hosp. Auth., 745 F.2d 904, 909 (4th Cir. 1984). In the present action, 29 U.S.C. § 1132(e)(2), provides for national service of process. The statute conferring jurisdiction is a federal statute granting jurisdiction to courts of the United States. The Nation, therefore, is the entity seeking to establish its power and process. When the national law is at issue, Congress may freely prescribe for service of process and the federal courts—wherever situated—may just as freely exercise jurisdiction, even over parties residing outside the forum state:

> The jurisdiction of the Supreme Court and the Court of Claims is not confined by geographical boundaries. Each of them, having by the law of its organization jurisdiction of the subject-matter of a suit, and of the parties thereto, can, sitting at Washington, exercise its power by appropriate process, served anywhere within the limits of the territory over which the Federal government exercises dominion.
>
> * * *
>
> It is true that Congress has declared that no person shall be sued in a circuit court [now, district court] of the United States who does not reside within the district for which the court was established, or who is not found there. But a citizen residing in Oregon may be sued in Maine, if found there, so that process can be served on him. There is, therefore, nothing in the Constitution which forbids Congress to enact that, as to a class of cases or a case of special character, a circuit court—any circuit court—in which the suit may be brought, shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision.

United States v. Union Pacific R.R., 98 U.S. 569, 603-04 (1878).

Moreover, the federal courts have specifically applied this reasoning and concluded that the *International Shoe Co.* analysis does not apply when federal courts are addressing federal law:

> Congress may provide for national service of process, *i.e., national exercise of personal jurisdiction by each of the district courts* based on presence of the defendant in the United States, rather than in any particular state. When Congress does not provide, the district court's service is not constrained by the due process limits to which state courts are subject.

Driver v. Helms, 74 F.R.D. 382, 390 (D.R.I. 1977) (citations omitted and emphasis supplied), *aff'd as to jurisdiction and modified on other grounds*, 577 F.2d 147 (1st Cir. 1978), *rev'd on other grounds sub nom., Colby v. Driver*, 444 U.S. 527 (1980) (*consolidated with Stafford v. Briggs*, 444 U.S. 527 (1980)). Specifically, the Fourth Circuit has held:

> [Defendant] argues before us that reliance on [Bankruptcy] Rule 704's provisions to determine whether the bankruptcy court had *in personam* jurisdiction over it would be misplaced, since valid service of process and personal jurisdiction are two separate concepts. In the abstract that may be true, but for purposes of proceedings arising from federal law, it is largely academic. . . . Where Congress has authorized nationwide service of process by federal courts under specific federal statutes, so long as the assertion of jurisdiction over the defendant is compatible with due process, the service of process is sufficient to establish the jurisdiction of the federal court over the person of the defendant.
>
> Since we have determined that Congress authorized nationwide service of process in cases like the present one, . . . [t]he propriety of process issuing

> from federal courts sitting in cases arising under federal law is not tested by [*International Shoe Co.*] because the issues involved necessarily are often national in character.

Hogue v. Mildon Eng'g, Inc., 736 F.2d 989, 991 (4th Cir. 1984) (citations omitted). Accordingly, the *Hogue* court held that a bankruptcy court in Virginia had personal jurisdiction over a non-resident California corporation because the bankruptcy law is federal law and provides for national process. Similarly, *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 824 (6th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982), held that "In an action where service of process is effected pursuant to a federal statute which provides for nationwide service of process, the strictures of *International Shoe* do not apply." *See also Gilbert v. Bagley*, 492 F. Supp. 714, 747 (M.D.N.C. 1980).

The Defendants consistently urge upon the court that South Carolina has no jurisdiction over them and that they have established no minimum contacts in the forum state. This assertion reveals the flaw in the Defendants' reasoning, and consequently, its authority. The United States, not South Carolina, is the sovereign asserting jurisdiction over the Defendants by virtue of a federal statute. The Defendants are residents of the United States and they need merely have minimum contacts with the United States to effect jurisdiction over them, not minimum contacts with the forum state. The Second Circuit in *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974), aptly addressed this issue. In *Mariash*, the Defendants were served with process in Massachusetts, but venue was laid in New York. The defendants claimed that New York did not have jurisdiction over them because they had not established minimum contacts with New York. The statute at issue was the Securities Act of 1934, 15 U.S.C. § 78a *et seq.* (1988), of which § 78aa provided for national service of

process. Rejecting the defendants' contention that federal courts in New York could not exercise *in personam* jurisdiction, the Second Circuit held:

> It is not the State of New York but the United States 'which would exercise its jurisdiction over them.' And plainly, where, as here, the defendants reside within the territorial boundaries of the United States, the 'minimal contacts,' required to justify the federal government's exercise of power over them, are present. Indeed, the 'minimal contacts' principle does not, in our view, seem particularly relevant in evaluating the constitutionality of *in personam* jurisdiction based on nationwide, but *not* extraterritorial, service of process.

Mariash, 496 F.2d at 1143 (emphasis in original). Similarly, the Fifth Circuit upheld jurisdiction, conferred by federal statute, over a non-resident defendant which transacted no business in the forum state. The court, as here, rejected the defendant's assertion that due process had been violated:

> Subject *only* to the regulation of Congress, each federal court exercises the 'judicial Power of the United States,' not a judicial power constitutionally limited by the boundaries of a particular district. Because the district court's jurisdiction is always potentially, and, in this case, actually co-extensive with the boundaries of the United States, due process requires only that a defendant in a federal suit have minimum contacts with the United States, 'the sovereign that created the court.'

FTC v. Jim Walter, Corp., 651 F.2d 251, 256 (5th Cir. 1981) (citations omitted and emphasis in original). Accordingly, provided that a defendant has minimum contacts with the United States, ERISA confers personal jurisdiction over the defendant in any federal district court. The irresistible conclusion, therefore, is that this court does exercise *in personam* jurisdiction over the Defend-

ants because the Defendants are residents of, and conduct business in, the United States.

Apart from the decisional law, this court's exercising personal jurisdiction over Peacock and Finegold comports with the Federal Rules of Civil Procedure. Specifically, Fed.R.Civ.P. 4(f) provides:

> All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, *when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state.* (emphasis supplied).

Thus, Rule 4(f) recognizes the power of Congress to provide for nationwide service of process to enforce a federal right, as the Supreme Court in *Union Pacific R.R.* noted. This Congressional authority to provide for national process springs from the right of any sovereign to exercise jurisdiction over any defendant within its territory. *Gilbert v. Bagley,* 492 F. Supp. 714, 746 (M.D.N.C. 1980); *First Flight Co. v. National Carloading Corp.,* 209 F. Supp. 730, 736 (E.D. Tenn. 1962). Finally, the court notes that the weight of authority holds that there is no requirement of minimum contacts with the state in which the federal court sits when a federal statute provides for nationwide service of process. As the District of the District of Columbia held in *Combs v. Adkins & Adkins Coal Co.,* 597 F. Supp. 122 (D.D.C. 1984):

> Moreover, this Court possesses personal jurisdiction over the defendants, who reside in Kentucky. Where Congress has authorized nationwide service of process, a federal court may exercise personal jurisdiction over any United States resident, without regard to whether its sister state court could assert jurisdiction under minimum contacts principles.

Id. at 125. *See also Alman v. Danin,* 801 F.2d 1, 5 (1st Cir. 1986); *Securities Investor Protection Corp. v. Vig-*

man, 764 F.2d 1309, 1314-15 (9th Cir. 1985); *Haile v. Henderson Nat'l Bank,* 657 F.2d 816, 824-26 (6th Cir. 1981), *cert. denied,* 455 U.S. 949 (1982); *FTC v. Jim Walter Corp.,* 651 F.2d 251, 256 (5th Cir. 1981); *Fitzsimmons v. Barton,* 589 F.2d 330, 334 (7th Cir. 1979); *Mariash v. Morrill,* 496 F.2d 1138, 1142-43 (2d Cir. 1974); *United States Telecom, Inc. v. Hubert,* 678 F. Supp. 1500, 1508 (D. Kan. 1987); *City of Harrisburg v. Bradford Trust Co.,* 621 F. Supp. 463, 467 (M.D. Pa. 1985); *Piper Acceptance Corp. v. Slaughter,* 600 F. Supp. 169, 171 (D. Colo. 1985); *Clement v. Pehar,* 575 F. Supp. 436, 438-39 (N.D. Ga. 1983); and *Gilbert v. Bagley,* 492 F. Supp. 714, 746-47 (M.D.N.C. 1980). Accordingly, this court, by virtue of ERISA's statutory authority, may exercise personal jurisdiction over Peacock and Finegold.

Concluding that *International Shoe Co.* does not apply to the present action, the type of process the Defendants are due must now be considered. Here, ERISA provides for nationwide service of process. Since a federal statute is at issue, the fifth amendment, not the fourteenth amendment, of the Constitution is implicated. Fifth amendment due process, with respect to national service of process, only requires that a defendant receive sufficient notice of a legal proceeding, namely by first class or certified mail. This is the rule of *Mullane v. Central Hanover Bank & Trust,* 339 U.S. 306 (1950). The issue, therefore, is one of notice under the fifth amendment. The process due the defendant is whether the service was reasonably calculated to inform the defendant of the pendency of the proceedings against him so that he might have an opportunity to be heard and establish a defense. Certainly, Peacock and Finegold, residents of the United States, were given sufficient notice of the action pending against them: the Defendants received service of process and employed counsel to appear on their behalf. Because the Defendants are cognizant of the proceeding instituted against them, Peacock and Finegold received sufficient due proc-

ess; and their Constitutional due process rights have not been violated.

B. *Venue*

In their motion, the Defendants alternatively move the court to transfer this action to the Western District of Pennsylvania. Peacock and Finegold allege that Pennsylvania, not South Carolina, is the appropriate form for this action. The Defendants are residents of Pennsylvania and some of the allegedly fraudulent actions of the Defendants occurred in Pennsylvania. In support of this contention, the Defendants cite the general venue provisions of 28 U.S.C. § 1404(a) (1988), and claim that transfer of venue is routinely granted. As with their personal jurisdiction argument, the venue argument is equally misplaced because *ERISA itself* provides for venue; thus, 28 U.S.C. § 1404(a) does not apply to this action. ERISA specifically provides that a plaintiff may bring an action: (1) in the district where the plan is administered; (2) where the breach took place; or (3) where the defendant resides or may be found. 29 U.S.C. § 1132 (e)(2). ERISA plainly states that venue may lie where the plan was administered. Venue is proper in South Carolina, therefore, because the plan was administered in South Carolina.

The Plaintiffs, as residents of South Carolina, have properly chosen to prosecute their action in the District of South Carolina; and a plaintiff's choice of forum should not be disturbed unless the balance of equities strongly favors the defendant. *Gulf Oil v. Gilbert,* 330 U.S. 501, 508 (1947); *Gross v. Owen,* 221 F.2d 94, 95 (D.C.Cir. 1955). Moreover, when a claim may conceivably be held to have arisen in more than one district, "a plaintiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility . . . may be assigned as the locus of the claim." *Leroy v. Great Western United Corp.,* 443 U.S. 173, 185 (1979)

(citations omitted). When Congress has enacted a special venue provision for a particular action which the complaining party meets, the impetus on transferring the case decreases while the burden on the movant demonstrating that the action should be transferred increases. *International Bhd. of Painters v. Best Painting and Sandblasting Co.,* 621 F. Supp. 906, 907 (D.D.C. 1985). Also, a transfer will not be effected where the inconvenience to the defendant would simply be shifted to the plaintiff. *Trustees of Nat'l Asbestos Workers Pension Fund v. Lake Erie Ins.,* 688 F. Supp. 1059, 1060 (D.Md. 1988).

In *Combs v. Adkins & Adkins Coal Co.,* 597 F. Supp. 122 (D.D.C. 1984), the court, in denying the defendant's motion to transfer venue of an ERISA action, held:

> This Court also declines to disturb the plaintiffs' choice of forum by transferring this action to Kentucky under the doctrine of *forum non conveniens* or pursuant to its discretion under 28 U.S.C. § 1404(a). Numerous decisions of this Court have denied similar motions filed by non-resident defendants in other ERISA cases. The defendants were given ample notice that litigation could ensue in the District of Columbia, and in any event, *it makes good sense to hear this case where the Plans are administered.*

Id. at 125 (citations omitted and emphasis supplied). The courts have uniformly held that venue is not freely transferred under ERISA when the beneficiaries have filed suit. *See Securities Investor Protection Corp. v. Vigman,* 764 F.2d 1309, 1317 (9th Cir. 1985), *Varsic v. United States District Court for the Central District of California,* 607 F.2d 245, 248 (9th Cir. 1979); *Trustees of the Nat'l Asbestos Workers Pension Fund v. Lake Erie Ins.,* 688 F.Supp. 1059, 1060 (D.Md. 1988), *United States Telecom, Inc. v. Hubert,* 678 F. Supp. 1500, 1504 (D. Kan. 1987), *International Bhd of Painters v. Best Painting and Sandblasting Co.,* 621 F. Supp. 906, 907 (D.D.C. 1985), *Trustees of the Nat'l Automatic Sprinkler Indus. Pension*

Fund v. Best Automatic Fire Protection, Inc., 578 F. Supp. 94, 96 (D.Md. 1983), and *Bostic v. Ohio River Co. Basic Pension Plan*, 517 F. Supp. 627, 637 (S.D. W.Va. 1981), all denying to transfer venue at an ERISA defendant's request.

Under ERISA's venue provisions, venue is proper in South Carolina. The plan was administered here when Tru-Tech had its corporate headquarters and sales offices in South Carolina. Since Plaintiff Thomas has chosen this district as his forum, the weight of authority dictates that it not be disturbed. Moreover, maintaining this action in this forum serves the broad remedial purposes of ERISA by removing procedural obstacles from the Plaintiffs-employees suit, which the legislative history of the Act clearly mandates. Accordingly, because venue is proper in this district and the Defendants' venue analysis misconceives the law, the motion to transfer is denied.

THEREFORE, THIS COURT ORDERS, ADJUDGES, AND DECREES that the motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(2) is DENIED, AND THIS COURT FURTHER ORDERS that the motion to transfer venue to the Western District of Pennsylvania pursuant to Fed.R.Civ.P. 12(b)(3) is likewise DENIED.

IT IS SO ORDERED.

/s/ William B. Traxler, Jr.
WILLIAM B. TRAXLER, JR.
United States District Judge

Greenville, South Carolina
June 23, 1992.

APPENDIX D

Filed December 2, 1994

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-2524

CA-91-3843-7-21

JACK L. THOMAS, Individually, on behalf of the Tru-Tech, Incorporated Pension Plan, and as a representative of a class of plaintiffs similarly situated,
Plaintiff-Appellee

v.

D. GRANT PEACOCK,
Defendant-Appellant

and

ALAN H. FINEGOLD,
Defendant

No. 93-1394

CA-91-3843-7-21

JACK L. THOMAS, Individually, on behalf of Tru-Tech, Incorporated Pension Plan, and as a representative of a class of plaintiffs similarly situated,
Plaintiff-Appellee

v.

D. GRANT PEACOCK,
Defendant-Appellant

and

ALAN H. FINEGOLD,
Defendant

No. 93-1469

CA-87-2243-7

JACK L. THOMAS, Individually, on behalf of the Tru-Tech, Incorporated Pension Plan, and as a representative of a class of plaintiffs similarly situated,
Plaintiff-Appellee

v.

TRU-TECH, INCORPORATED; D. GRANT PEACOCK,
Defendants-Appellants

and

GRANT PEACOCK & COMPANY, INCORPORATED; CONNECTICUT GENERAL LIFE INSURANCE COMPANY,
Defendants

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX E

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (*l*) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169 (a)(2)(A) of this title); or

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

APPENDIX F

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dimissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(Added Pub.L. 101-650, Title III, § 310(a), Dec. 1, 1990, 104 Stat. 5113.)

Supreme Court, U.S.
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No. 94-1453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

D. GRANT PEACOCK,
Petitioner,
v.
JACK L. THOMAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. May a federal court assert ancillary jurisdiction over a cause of action to pierce the corporate veil under ERISA?

2. May a federal court apply the federal common law veil-piercing rule in ERISA actions to enforce a judgment?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1453

D. GRANT PEACOCK,

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v.

JACK L. THOMAS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is a lawsuit brought by the Respondent, Jack L. Thomas ("Thomas") to pierce Tru-Tech, Inc.'s corporate veil in order to reach the Petitioner, D. Grant Peacock ("Peacock"), an officer and shareholder of Tru-Tech.

Thomas, a former employee of Tru-Tech, originally brought a class action suit against Tru-Tech and Peacock under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.* The district court ruled in favor of the plaintiff class as against Tru-Tech but held Peacock was not liable as a plan fiduciary. *Thomas v. Tru-Tech, Inc.*, No. 87-2243-3, 1988 U.S. Dist. LEXIS 15929, 1988 WL 212511 (D.S.C. Nov. 28, 1988). The United States Court of Appeals for the

Fourth Circuit affirmed the district court's opinion. *Thomas v. Tru-Tech, Inc.*, 900 F.2d 256 (4th Cir. 1990) (unpublished disposition; full text at 1990 WL 48865). Thomas then commenced this current litigation against Peacock individually, seeking to pierce Tru-Tech's corporate veil.

Thomas sued Peacock individually because Peacock and his attorney, Alan H. Finegold, schemed to siphon off Tru-Tech's assets in order to prevent the collection of the judgment against Tru-Tech. Money was transferred from Tru-Tech to Peacock's wife, to Peacock's lawyer and to Peacock's business, Peacock, Williams & Company ("P,W & C"). At a Tru-Tech Board meeting held on March 6, 1989, Peacock agreed to pay $130,000 of Tru-Tech funds to P,W & C. Although Peacock claimed that this transfer was to repay P,W & C for money paid to Tru-Tech's president to manage Tru-Tech's affairs, the district court noted that the evidence showed that P,W & C had previously written off that debt. On July 1, 1989, the Tru-Tech Board of Directors, of which Peacock was by then the sole member, approved a transfer of $47,000 to P,W & C. In February of 1990, Peacock officially resigned as a Director of Tru-Tech, but he continued to sign checks drawn on Tru-Tech's bank accounts for months to come. Based on transfers of funds such as the ones described, the district court found that Peacock failed to observe the corporate form and depleted Tru-Tech's assets in order to avoid collection of the Thomas judgment and in order to enrich himself. The district court ruled that it was proper for Thomas to pierce Tru-Tech's corporate veil in order to reach Peacock. Peacock appealed to the Fourth Circuit which affirmed the district court's decision. *Thomas v. Peacock*, 39 F.3d 493 (4th Cir. 1994).

In a unanimous opinion written by Judge Donald Russell and joined by Judge Widener and Senior Judge Chapman, the Fourth Circuit held that the federal court had subject matter jurisdiction over the case because it

arose under ERISA. Furthermore, the Court ruled that the district court did not err by applying a federal common law standard for piercing the corporate veil.

The Fourth Circuit reasoned that the equitable doctrine of piercing the corporate veil was "necessarily subsidiary to some primary cause of action, ... Thus, . . . not a mere procedural rule relating to 'how' a judgment is to be enforced, but is, rather, a substantive rule of liability." 39 F.3d at 500. The court took great pains to ensure that its ruling was in compliance with *H. C. Cook Co. v. Beecher*, 217 U.S. 497, 30 S. Ct. 601 (1910). Thomas' effort to pierce the corporate veil was not found to be independent of his prior litigation and, thus, not in conflict with *Beecher*. 39 F.3d at 501. Some circuits have based federal ancillary jurisdiction in veil-piercing actions on the proposition that this Court's decision in *Beecher* may lack continuing vitality. *Argento v. Village of Melrose Park*, 838 F.2d 1483 (7th Cir. 1988); *Skevofilax v. Quigley*, 810 F.2d 378 (3d Cir. 1987) (*en banc*), *cert. denied*, 481 U.S. 1029, 107 S. Ct. 1956 (1987). The Fourth Circuit, by contrast, did not challenge *Beecher* but simply distinguished it on its facts. Whereas Thomas alleges that Peacock wrongfully ignored corporate formalities and improperly transferred funds in an effort to evade the judgment against Tru-Tech, *Beecher* involved a suit to enforce a judgment against officers of a corporation who were acting within their legal capacity. 39 F.3d at 501.

After establishing that jurisdiction was proper in federal court, the Fourth Circuit then ruled that applying the federal common law rule for piercing the corporate veil was appropriate in ERISA cases. While recognizing that *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 108 S. Ct. 2182 (1988), held that "ERISA does not provide an enforcement mechanism for collecting judgments won" in suits brought by plan beneficiaries, pursuant to ERISA § 502(a)(1)(B), (d), 29 U.S.C. § 1132 (a)(1)(B), (d), against ERISA benefit plans, the Fourth

Circuit noted that piercing the corporate veil is not merely a mechanism for collecting a judgment. 39 F.3d at 503. Because Thomas seeks to pierce the corporate veil to determine who is liable under ERISA, the court held that ERISA preempts state law rules of veil-piercing. *Id.* Therefore, the federal common law rule of veil-piercing must apply in ERISA actions. The Fourth Circuit adopted the rule articulated by the First Circuit in *Alman v. Danin*, 801 F.2d 1 (1st Cir. 1986),[1] finding its reasoning persuasive and in accordance with the veil-piercing rules followed in other circuits. 39 F.3d at 503.

For these reasons, the Fourth Circuit found that the district court had properly asserted ancillary jurisdiction and had properly applied the federal common law veil-piercing standard when piercing the corporate veil under ERISA.

SUMMARY OF ARGUMENT

First, the Fourth Circuit's decision is in keeping with this Court's decisions in *Beecher* and *Kokkonen v. Guardian Life Insurance Co.*, 114 S. Ct. 1673 (1994), over the scope of federal ancillary jurisdiction. In addition, there is no split among the circuits as to the very narrow question of ancillary jurisdiction over an action to pierce the corporate veil in order to collect a judgement in an ERISA case. Simply put, it would be premature for this Court to grant Peacock's petition because so few courts have addressed this narrow issue. Nor has the impact of 28 U.S.C. § 1367 been felt on this issue. So even if this Court disagrees and finds a split among the circuits, that split may disappear once courts have an opportunity to apply and interpret § 1367.

Second, the Fourth Circuit's decision is not contrary to this Court's decisions in *Mertens v. Hewitt Associates*, 113

[1] In *Alman*, the First Circuit reasoned that because ERISA does not attach great weight to corporate form, the "corporate entity may be disregarded in the interests of public convenience, fairness and equity." 801 F.2d at 3 (quoting *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981)).

S. Ct. 2063 (1993) or *Mackey*. The equitable doctrine of piercing the corporate veil is a substantive rule of liability, not a mere collection action. Furthermore, there is no confusion among the circuit courts as to piercing the corporate veil in ERISA cases. The petitioner sees confusion and discord where none exists. The Court should deny the petition for a Writ of Certiorari.

REASONS FOR DENYING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS IN *BEECHER* OR *KOKKONEN*.

The Fourth Circuit found that it had ancillary jurisdiction over Thomas' attempt to pierce the corporate veil. This decision is not in conflict with *Beecher*. In *Beecher*, a corporate patent holder brought a patent infringement action in federal court. While the suit was pending, the directors of the defendant corporation voted to continue sales despite allegations in the lawsuit that the sales were in violation of the plaintiff's patent. Although winning the patent infringement case, plaintiff was unable to collect from the defendant corporation because it had become insolvent. Plaintiff then filed another lawsuit in federal court against the directors of the defendant corporation, alleging that the defendant directors had voted to continue sales with the purpose of rendering the company insolvent in the event that the plaintiff was successful in its patent infringement suit. The Court found that the plaintiff was attempting "to make the defendants answerable for the judgment already obtained," 217 U.S. at 498, 30 S. Ct. at 601-02, and held that the case did not fall within the federal court's ancillary jurisdiction. *Id.* at 499, 30 S. Ct. at 602.

Beecher is distinguishable from the case before this Court. *Beecher* dealt with litigation that was truly independent from the prior litigation. Thomas' effort to pierce the corporate veil is not independent of his prior

litigation. As the Fourth Circuit noted, "an attempt to pierce the corporate veil is necessarily subsidiary to some primary cause of action." 39 F.3d at 500. By its very nature, an attempt to pierce the corporate veil cannot be independent of the primary cause of action.

Nor is the Fourth Circuit's decision in conflict with *Kokkonen*. As Peacock himself concedes, *Kokkonen* is not controlling. *Kokkonen* addresses the federal court's jurisdiction to enforce a settlement agreement from a prior federal case. The litigation over the settlement agreement was for breach of a contract and was purely independent from the prior federal case. In *Kokkonen*, the Court noted that

> Generally speaking we have asserted ancillary jurisdiction (in the very broad sense in which that term is sometimes used) for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.

114 S. Ct. at 1676 (citations omitted). As to the first purpose enunciated by *Kokkonen*, by its very nature an attempt to pierce the corporate veil is factually dependent upon the earlier claims under ERISA. As to the second purpose for ancillary jurisdiction, by attempting to pierce the corporate veil, Thomas is clearly asking the federal court to effectuate its decree in the earlier action. This is the type of situation envisioned by the Court in *Kokkonen* as warranting the exercise of ancillary jurisdiction:

> "The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a

> breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist."

Id. at 1677. That is close to the situation presented here. The district court found that Peacock failed to observe the corporate form and deliberately siphoned off Tru-Tech's assets with the specific intent and purpose of defeating the collection of the judgment against Tru-Tech. Clearly, the federal courts may exercise jurisdiction over an action to pierce the corporate veil in order to hold liable one who has been actively and purposefully attempting to defeat a legitimate effort to collect a lawful judgment. To conclude otherwise would cast into doubt a court's ability to vindicate its authority and to effectuate its decrees.

II. THERE IS NO MEANINGFUL SPLIT IN THE CIRCUITS CONCERNING FEDERAL ANCILLARY JURISDICTION OVER ACTIONS TO PIERCE THE CORPORATE VEIL IN ORDER TO COLLECT PRIOR JUDGMENTS UNDER ERISA.

Peacock cites *Sandlin v. Corporate Interiors, Inc.*, 972 F.2d 1212 (10th Cir. 1992), *Sederquist v. Court*, 861 F.2d 554 (9th Cir. 1988), *Berry v. McLemore*, 795 F.2d 452 (5th Cir. 1986), *Redding Ford v. California State Bd. Of Equalization*, 722 F.2d 496 (9th Cir. 1983), *Fidelity & Casualty Co. v. Reserve Ins. Co.*, 596 F.2d 914 (9th Cir. 1979), and *National Westminster Bank U.S.A. v. Cheng*, 751 F. Supp. 1158 (S.D.N.Y. 1990) as cases demonstrating a split in the circuits. The facts of these cases are distinguishable from the facts currently before the Court. Not one of those cases deals with an effort to pierce the corporate veil under ERISA.

Sandlin actually supports the Fourth Circuit's decision to find ancillary jurisdiction. Although the Tenth Circuit found no adequate basis for ancillary jurisdiction when it applied the *Beecher* standard to the facts before it, the court noted that ancillary jurisdiction may well be found

if the alter ego claims were more closely connected to the underlying claim. Furthermore, the court indicated that ancillary jurisdiction may be based upon a successor theory if the plaintiff could allege "post-judgment transfers of property." 972 F.2d at 1217 (citations omitted). The facts that the Tenth Circuit foresaw as being able to provide ancillary jurisdiction exist in this case. Thomas' allegations that Peacock was the alter ego for Tru-Tech are irreversibly bound to the merits of the initial litigation and involve post-judgment transfers of property in an effort to defeat collection of the initial judgment.

Nor can it be said that *Berry* is in direct conflict with the Fourth Circuit's decision. *Berry* involves a garnishment action brought against the alleged indemnitors of a judgment debtor. The sole connection between the alleged indemnitors and the initial litigation was an indemnity contract with the defendants in the initial case. The alleged indemnitors played no role in the initial litigation. Such cannot be said about Peacock and the initial litigation brought by Thomas.

Peacock argues that the Second Circuit should also be counted among the circuits in direct conflict with the Fourth Circuit's ruling. He reaches this conclusion on the basis, not of a case decided by the Second Circuit, but on a case decided by the district court in the Southern District of New York. *National Westminster Bank,* like the case before this Court, involves an effort to pierce the corporate veil in order to collect a judgment. The district court found no nexus between the original litigation and a subsequent veil-piercing action, and, therefore, found no ancillary jurisdiction. Even if this decision is at odds with the decision rendered by the Fourth Circuit, it is unreasonable to suggest that, on the basis of this one decision from a district court, the Second Circuit is at odds with the Fourth Circuit. Peacock indicates that the decision in *National Westminster Bank,* standing alone, is indicative of the Second Circuit's position be-

cause the principle relied upon by the district court was derived from the Second Circuit's opinion in *Manway Constr. Co. v. Housing Auth. Of the City of Hartford,* 711 F.2d 501 (2d Cir. 1983). As Peacock notes, however, *Manway* involves totally different facts from this case. *National Westminster Bank* simply cannot predict the position the Second Circuit will take when presented with a veil-piercing action under ERISA to collect a prior judgment.

Likewise, it is ludicrous to suggest that the Fourth Circuit is at odds with the Ninth Circuit on this issue considering that the Ninth Circuit held in *Blackburn Truck Lines v. Francis,* 723 F.2d 730 (9th Cir. 1984), that the federal court had jurisdiction over a suit brought to pierce the corporate veil in order to reach the owners of bankrupt corporations in order to collect a prior judgment.

III. IT WOULD BE PREMATURE FOR THIS COURT TO ADDRESS THE ISSUE OF ANCILLARY JURISDICTION OVER AN ACTION TO PIERCE THE CORPORATE VEIL IN ORDER TO COLLECT A PRIOR JUDGMENT UNDER ERISA.

Granting Peacock's petition would be premature. First of all, there simply have been too few cases decided which address this issue. In his efforts to demonstrate a split in the circuits, Peacock has cited cases which are not close enough factually to warrant comparison. This is not merely a case to collect a judgment; it is an action to pierce the corporate veil to collect a judgment in an ERISA action. Opinions which examine the issue of ancillary jurisdiction in litigation brought to collect prior judgments, but not involving attempts to pierce the corporate veil under ERISA, simply do not address the narrow issue in this case.

Furthermore, few courts have had an opportunity to address this issue since 28 U.S.C. § 1367, the statute

codifying ancillary and pendent jurisdiction, went into effect on December 1, 1990. Even if this Court were to determine that a significant split in the circuits exists on the issue of ancillary jurisdiction, there is no way of knowing at this time whether the split would remain once courts have had an opportunity to apply § 1367. This new statute may well result in greater uniformity in the circuits for all issues dealing with what used to be known as pendent and ancillary jurisdiction. Until more appellate courts are confronted with actions to pierce the corporate veil in order to collect a judgment in an ERISA action and until more courts have had an opportunity to apply and interpret 28 U.S.C. § 1367, the issue presented to this Court is simply not ripe for consideration. It would be premature for this Court to grant Peacock's petition.

IV. THE FOURTH CIRCUIT'S DECISION TO APPLY FEDERAL COMMON LAW VEIL-PIERCING STANDARDS IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS IN *MERTENS* OR *MACKEY*, NOR IS THERE CONFUSION ABOUT VEIL-PIERCING UNDER ERISA IN THE CIRCUIT COURTS.

In *Mertens*, the Court held that ERISA does not provide for actions seeking monetary damages against non-fiduciaries. The Fourth Circuit's decision does not conflict with this holding. Thomas is not engaging in an independent action for monetary damages; he is engaging in an equitable action to satisfy a prior judgment. Furthermore, as discussed above, the veil-piercing action is dependent upon the prior litigation. It is not an independent action at all.

Nor does the Fourth Circuit's decision conflict with *Mackey*. Peacock relies heavily upon the statement in *Mackey* that "ERISA does not provide an enforcement mechanism for collecting judgments won" in actions brought against plans by proported beneficiaries or in

actions brought by general creditors of the plan. 486 U.S. at 833, 108 S. Ct. at 2187. As the Fourth Circuit noted, however, Peacock's reliance upon this statement is misplaced. *Mackey* does not preclude the application of a federal common law veil-piercing rule in ERISA actions. An attempt to pierce the corporate veil is not a mere enforcement mechanism for collection of a judgment. Thomas' action seeks to apply the general purposes and principles of ERISA to pierce Tru-Tech's corporate veil in order to hold Peacock liable for the actions of his alter ego. The fact that this case is not a mere collection action is brought home by the realization that a collection action under state law may yet have to be brought against Peacock to collect the judgment against him if the Fourth Circuit's decision stands.

Finally, Peacock argues that there is a "broad and continuing confusion" over piercing the corporate veil in ERISA actions. There is no such confusion. The courts are in consensus that it is proper to pierce the corporate veil to enforce a judgment when there is evidence of wrongdoing and a failure to observe the corporate form. The cases Peacock cites demonstrate this. In *International Brotherhood of Painters and Allied Trades Union v. Kracher*, 856 F.2d 1546 (D.C. Cir. 1988), the court concluded its opinion by emphatically stating: "[w]e stress again that this case involves no claim of alter ego or conduct that might result in the necessity to pierce the corporate veil." *Id.* at 1550, n.28. In *Connors v. P & M Coal Co.*, 801 F.2d 1373 (D.C. Cir. 1986), the court noted that in general "shareholders and officers may be held personally liable for their corporations' obligations under ERISA if they have acted as the alter egos of their corporations or otherwise met the requirements that justify piercing the corporate veil under traditional common law principles." *Id.* at 1378. In *Operating Engineers Pension Trust v. Reed*, 726 F.2d 513 (9th Cir. 1984), the court recognized that an individual should be held personally liable for trust fund obligations of a

corporation controlled by that individual only if there has been a failure to observe the proper corporate form, and there is fraud involved. *Id.* at 515. Clearly these cases are not in conflict with the Fourth Circuit's decision. Courts are not reluctant to pierce the corporate veil when they are confronted with fraud and injustice. See *Alman*, 801 F.2d 1 (1st Cir. 1986).

CONCLUSION

Review by this Court of the Fourth Circuit's decision would be unwarranted and premature. There currently exists no significant conflict between the Fourth Circuit's decision and the decisions of this Court and other circuits. Furthermore, the impact of 28 U.S.C. § 1367 has yet to be felt on the issues presented by this case.

Respectfully submitted,

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Supreme Court U.S.
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No. 94-1453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

D. GRANT PEACOCK,
Petitioner,

v.

JACK L. THOMAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 1, 1995
CERTIORARI GRANTED MAY 22, 1995

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The following opinions and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Order of the United States District Court for the District of South Carolina, entered on June 24, 1992	54a
Order, Findings of Fact and Conclusions of Law of the United States District Court for the District of South Carolina, entered on October 28, 1992	30a
Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit, dated November 4, 1994	1a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Dec. 23, 1991—Plaintiff Thomas' original complaint filed in the U.S. District Court for the District of South Carolina, Spartanburg Division.

Feb. 7, 1992—Plaintiff Thomas' first amended complaint filed.

March 3, 1992—Defendant Peacock's answer to first amended complaint filed.

April 15, 1992—Defendant Peacock's motion to dismiss plaintiff's complaint or, in the alternative, to transfer case to the Western District of Pennsylvania, supporting memorandum and affidavit filed.

June 24, 1992—Order denying motion to dismiss or, in the alternative, to transfer case to the Western District of Pennsylvania.

Aug. 25, 1992—Bench trial held before Judge William B. Traxler, Jr.

Oct. 28, 1992—Order, Findings of Fact and Conclusions of Law that plaintiff shall have judgment against Peacock.

Oct. 28, 1992—Judgment of District Court awarding plaintiff Thomas judgment in the amount of $187,628.93 together with interest at the rate of 8.55% and costs under 29 U.S.C. 1132(q) entered against defendant Peacock.

Nov. 25, 1992—Notice of Appeal filed by Peacock.

March 1, 1993—Brief and Joint Appendix filed by appellant Peacock.

April 15, 1993—Brief filed by appellee Thomas.

April 29, 1993—Reply Brief filed by appellant Peacock.

May 9, 1994—Oral argument heard.

Nov. 4, 1994—Published, authored opinion and Judgment of the Court of Appeals for the Fourth Circuit filed.

Nov. 18, 1994—Petition for Rehearing filed by appellant Peacock.

Dec. 2, 1994—Court Order filed denying motion for rehearing and denying suggestion for rehearing in banc.

[Entered Nov. 28, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

C/A No. 87-2243-3

JACK L. THOMAS, Individually, on Behalf of the Tru-Tech, Inc., Pension Plan, and as Representative of a Class of Plaintiffs Similarly Situated,

Plaintiffs,

vs.

TRU-TECH, INC.; D. GRANT PEACOCK; GRANT PEACOCK AND CO., INC.; and CONNECTICUT GENERAL LIFE INSURANCE COMPANY,

Defendants.

ORDER

This class action was brought under the Employee Retirement Income Security Act of 1974, 29 *U.S.C.* § 1001, *et seq.* The plaintiff class consists of former salaried employees of the defendant Tru-Tech, Inc. The plaintiffs claim that the defendants represented to the class that they would be covered by a pension plan. The pension plan was to be effective on October 1, 1981 according to a summary plan descripiton which was distributed to the class in August of 1982. The majority of the class had been previously employed by the Draper Division of Rockwell International and their former service with Draper was to be counted toward vesting with Tru-Tech.

The amended complaint alleges that each of the defendants exercised discretionary authority, control or responsibility over the administration and management of the

plan and, therefore, were fiduciaries under the plan. The amended complaint then alleges that they breached their fiduciary duties to the plaintiff class by:

1. Failing to properly fund the plan.

2. Failing to have the plan approved by IRS.

3. Using the tentative disapproval by IRS as a pretext to terminate the plan and refund contributions to the defendant.

Two other causes of action allege breach of contract and civil conspiracy. The defendants filed a general denial.

The primary contention of the plaintiffs is as follows: After initiating the plan Tru-Tech began to experience financial difficulties. They obtained a deferment of contributions. The IRS then notified Tru-Tech that its proposed 10 year cliff vesting schedule was not acceptable. A previous resolution of the Board of Directors had authorized the executive officers of Tru-Tech to make technical or administrative amendments to the plan. Tru-Tech's President and Secretary executed an amendment to the plan pursuant to this resolution, changing the vesting schedule to 4-40. The plan was then given preliminary approval by IRS. Subsequently, plaintiffs allege that the defendants conspired together to convince the IRS that this amendment was without authority. In doing so, they misrepresented to the IRS that the President had executed the resolution for his own financial benefit. They also failed to disclose the previous resolution of the board authorizing the executive officers to make technical or administrative amendments to the plan. Later they conspired together to prevent the class from learning of these developments.

THE EVIDENCE

On December 4, 1981, the Board of Directors of Tru-Tech elected B. W. Wilcock President and B. J. Myers, Jr. Assistant Secretary and Treasurer. At the same meeting, defendant Grant Peacock, as Chairman of Tru-Tech, presented a Defined Contribution Pension Plan for Salaried Employees which Tru-Tech had entered into with Connecticut General Life Insurance Company. A resolution was then passed authorizing "the executive officers of the corporation" to "make such technical or administrative amendments to the plans . . . as they in their discretion deem advisable or as may be requested by the Internal Revenue Service . . . ." [Plaintiffs' Exhibit #21.]

About this time, it was represented to the salaried employees that this plan was in existence and, in August of 1982, a plan booklet was distributed to the class representing that the pension plan had become effective on October 1, 1981. [Plaintiffs' Exhibit #28.] This booklet represented to the salaried employees that specific contributions would be made to the plan by Tru-Tech. Although the plan itself [Plaintiffs' Exhibit #13] states that it was subject to approval by IRS, no such statement is contained in the plan booklet. The plan provided for 10 year cliff vesting.

The plan was not submitted to the IRS for approval until December 31, 1982 [Plaintiffs' Exhibit #1]. This submission shows that 14 of the 25 (56%) of the salaried employees included in the "employee census" had more than 10 years of service and 3 others had 9 years of service (68% had 9 years or more toward vesting) at that time.

At a meeting of the Tru-Tech Board of Directors on January 7, 1983, the defendant Grant Peacock presented what he called "several technical amendments" to the retirement plan for hourly rated employees including a change in the "service requirement for disability benefits." [Plaintiffs' Exhibit #22.]

On June 14, 1983, Tru-Tech filed its federal corporate income tax return in which it deducted payments to its

pension and profit sharing plans in the amount of $30,516.00. [Plaintiffs' Exhibit #26, 1. 24].

On July 23, 1983, the Internal Revenue Service responded to Tru-Tech's request for approval of the pension plan stating in part as follows:

> Section 11 of the adoption agreement indicates that the employer has elected cliff vesting. Cliff vesting is not acceptable for initial qualifications. The vesting schedule elected must be as good as the 4-40 vesting schedule or better. Never more stringent. Amend plan or adoption agreement to incorporate a liberal vesting schedule . . . . [Plaintiffs' Exhibit #2, item 1].

On the copy of this document maintained in the Tru-Tech files and produced by them through discovery, the word "done" is handwritten by some unidentified employee of Tru-Tech following this request. [Plaintiffs' Exhibit #2].

On September 14, 1983, less than two months after the request by IRS for a change in the vesting schedule, Tru-Tech's President, B. W. Wilcock, and Assistant Secretary, B. J. Myers, Jr., executed an amendment to the Tru-Tech pension plan which reads as follows:

> Effective October 1, 1981, Section XII—Vesting Percentage, Section 1.42 is hereby amended to elect "f"—40% after 4 years of Service; 5% for each of the next 2 Years of Service; 10% for each Year of Service thereafter. [Plaintiffs' Exhibit #4].

At the same time, another amendment to the pension plan was adopted changing the minimum age requirement to 24 years. [Plaintiffs' Exhibit #5].

A copy of the "adoption agreement" between Tru-Tech and Connecticut General for the pension plan was obtained during discovery from attorney Robert Johnson of Buchanan Ingersoll, Tru-Tech's corporate counsel.

[Plaintiffs' Exihibit #12]. This document shows that it was executed on December 29, 1981 by Tru-Tech's President, B. W. Wilcock. It further shows that Section XII, "Vesting Percentage" was originally marked with a typed "X" next to item (d): "100% after 10 Years of Service," commonly called 10 year cliff vesting. [Plaintiffs' Exhibit #12, page 4.] Handwritten notes adjacent to this section read "amendment * change to F." [Plaintiffs' Exhibit 12, page 4]. Item (f) reads: "*40% after 4 Years of Service; 5% for each of the next 2 Years of Service; 10% for each Year of Service thereafter," commonly called a 4-40 vesting schedule or 4-2-2.

In December of 1983 and again in June of 1984, there is correspondence between Tru-Tech, Grant Peacock and Company and Tru-Tech's corporate attorneys, Buchanan Ingersoll, concerning the deductibility of contributions to the pension plan [see Plaintiffs' Exhibits 29 and 24]. There are also handwritten notes entitled "Tru-Tech Salaried Pension Plan" which were obtained by the plaintiffs during discovery from Robert Johnson of Buchanan Ingersoll which state as follows:

> 1. Plans filed with IRS in January '83 for determination letters with Atlanta District Director.
>
> 2. Plan amendment and request for funding waiver and determination letter on amendment, filed April 14, 1983.
>
> 3. Some time in spring '83 I think B.J. told me that IRS requested some amendments within 30 days, which had not been sent, and that IRS said it would close file.
>
> 4. Pension Plan Section 15.7 blows up plan only if there is an initial *final* adverse ruling by IRS.
>
> 5. Only likely way to get initial adverse ruling is to ask IRS where case stands—must supply IRS

case number, ETC.—and press for final determination.

6. *Fiduciary implications*: Board's decision in first place whether to adopt a plan in first place and choice of discretionary plan design features, is probably not a fiduciary decision. However, if amendments requested by IRS were of minor technical nature—query whether fiduciary breach not to take appropriate action to make amendments. Bill Wilcock is certainly bright enough to think of this, but may not assert it. Query—scope of release. [Plaintiffs' Exhibit #23].

On July 23, 1984, T. H. Williams wrote a letter to the IRS as Executive Vice President of Tru-Tech [Plaintiffs' Exhibit #6]. The same T. H. Williams also served as Executive Vice President of the defendant Grant Peacock and Co., Inc. [see Plaintiffs' Exhibit #17]. This letter stated in part as follows:

> . . . we promised the salaried employees a pension plan and agreed to credit them with previous service at Rockwell for calculation of vesting . . . .
>
> When the plan was submitted with a 10 year cliff vesting provision, the IRS requested we change it to 4-2-2 or the plan would not be approved. On September 18, 1983, almost 2 years after the supposed effective date of the plan, the President of the company submitted the amendment converting to 4-2-2 and the IRS subsequently approved the plan.
>
> Legally, however, such an amendment was not approved by the Board of Directors . . . . As it turns out, the President, Bill Wilcock, was at the time in serious disagreement with the board and resigned from the company 3 weeks later on October 4, 1983. Mr. Wilcock had a direct financial gain associated with filing an amendment converting the investment provisions to 4-2-2.

> The position of True-Tech is simple. The Board of Directors approved a 10 year vesting schedule only . . . . Therefore, please either accept the 10 year cliff vesting or disapprove the plan. [Plaintiffs' Exhibit #6].

On August 21, 1984, T. H. Williams again wrote to the IRS as Executive Vice President of Tru-Tech stating in part as follows:

> . . . we have decided to withdraw our request for IRS approval and qualification of this proposed plan. [Plaintiffs' Exhibit #7].

The following day T. H. Williams again wrote to the IRS stating in part as follows:

> . . . we have decided that, for the reasons described in my letter of July 23, 1984, we cannot amend the plan to adopt the 4-2-2 vesting schedule which the IRS requested as a precondition to issuance of a favorable determination letter . . . . Accordingly, please issue an adverse determination on our application so that we may move on to a consideration of alternative ways of providing retirement benefits for our employees. [Plaintiffs' Exhibit #8].

On October 22, 1984, the Board of Directors of Tru-Tech issued an amendment to the Tru-Tech pension plan executed by the defendant Grant Peacock as Chairman and attested by T. H. Williams as Assistant Secretary, which stated in part as follows:

> WHEREAS, on September 14, 1983, Section XII—Vesting Percentage, Section 1.42 was amended by the President of the Company and submitted to the Internal Revenue Service without appropriate Board of Directors' approval;
>
> THEREFORE, effective October 1, 1981, Section XII—Vesting Percentage, Section 1.42 is hereby

> confirmed and continued in force to this day to elect 'd' 100% after 10 years of service. [Plaintiffs' Exhibit #10].

The same day, T. H. Williams as Executive Vice President of Tru-Tech wrote the IRS enclosing the amendment stating in part as follows:

> . . . it is our position that the amendment filed September 14, 1983 by B. W. Wilcock, adopting a 4-2-2 vesting schedule was not authorized and that the amendment herein attached merely confirms the original election by the board . . . . [Plaintiffs' Exhibit #9].

On January 31, 1985, the District Director of IRS wrote Tru-Tech stating that the pension plan "does not meet the requirements of Section I of the Internal Revenue Code." [Plaintiffs' Exhibit #11]. Attached to this adverse determination letter was a 4 page document entitled "Explanation of Items" and another document outlining the appeal procedure for adverse determination letters. The document entitled "Explanation of Items" outlined the following facts:

1. On December 29, 1981, Tru-Tech adopted the Connecticut General prototype plan effective October 1, 1981.

2. On April 14, 1983, Tru Tech submitted the plan for approval to the IRS together with a request for waiver of funding for the plan year ending September 30, 1982.

3. Prior to submission of the plan to the national office, the IRS regional office requested an amendment of the 10 year cliff vesting schedule.

4. On September 14, 1983, Tru-Tech amended the plan to elect the 4-40 vesting schedule in lieu of the 10 year cliff vesting schedule.

5. "The Waiver of Minimum Funding and the Amendment to the Plan" was approved on May 30, 1984 as a National Office Technical Advice Memorandum.

6. On July 23, 1984, Tru-Tech wrote IRS stating that the September 14, 1983 amendment had not been approved by the Board of Directors and that "it was their wish to maintain a 10 year cliff vesting schedule."

7. On August 22, 1984, Tru Tech requested an adverse determination letter.

8. In connection with the request for an adverse determination letter "on August 22, 1984, Tru-Tech, Inc. adopted an amendment to the adoption agreement changing the 4-40 vesting schedule back to the 10 year 'cliff' vesting previously selected." [Plaintiffs' Exhibit #11].

When no appeal was initiated by Tru-Tech, the IRS issued a final adverse determination letter on May 23, 1985. [Plaintiffs' Exhibit #11a].

On June 14, 1985, Buchanan Ingersoll as corporate counsel for Tru-Tech wrote to T. H. Williams as Executive Vice President of the defendant Grant Peacock and Co. enclosing a draft of a proposed letter to the class representative's lawyer for signature by John Blackman as President of Tru-Tech. This letter to Williams stated in part as follows:

> There should be attached to the letter copies of the Plan and Adoption Agreement and a copy of the first page of the IRS adverse determination letter. [Plaintiffs' Exhibit #11]. While I do not believe you are required to provide any portion of the IRS letter to his lawyer, giving him at least the first page (and not the explanation) [the "Explanation of Items" attachment] should give him independent confirmation of the plan never being qualified. I suggest that any marginal notations on the copies of the Plan and Adoption Agreement [Plaintiffs' Exhibit #12] that are provided to his lawyer be re-

moved, as these are not part of the official documents. [Plaintiffs' Exhibit #17].

On June 21, 1985, John Blackman as President of Tru-Tech wrote to the class representative's attorney as previously instructed by Buchanan Ingersoll enclosing a copy of the IRS adverse determination letter without attachments stating in part as follows:

> . . . I am . . . enclosing a copy of a letter recently received from the Internal Revenue Service denying qualifying status for this pension plan, retroactive to its initial effective date. Because of this adverse determination by the Internal Revenue Service, the Plan . . . is deemed not to have existed and all contributions are refundable to Tru-Tech, Inc. For this reason, Mr. Thomas is not entitled to any benefits from the Plan. [Plaintiffs' Exhibit #16].

Tru-Tech then notified the remaining salaried employees on July 25, 1985 of the IRS adverse determination letter stating in part as follows:

> As a result of this ruling there can be no pension benefits paid to you under Tru-Tech, Inc.'s proposed plan. [Plaintiffs' Exhibit #15].

In addition to the exhibits outlined above, plaintiff submitted deposition testimony of several witnesses whose testimony is outlined below:

1. B. W. Wilcock, who served as President of Tru-Tech until his termination in early October of 1983, testified that when the pension plan was adopted it was Tru-Tech's intention to have it qualified by IRS [3 (16-24)]. He denied that the resolution changing the vesting schedule from 10 year cliff vesting to 4-40 was done for his own financial benefit [4 (12-19)] and testified that when this amendment was adopted he had no indication that his continued employment was in jeopardy [4 (20-24)]. With respect to Tru-Tech's representation to IRS in Plaintiffs' Exhibit #6 that "the Board of Directors approved a

10 year vesting schedule only," Mr. Wilcock testified as follows:

> I don't recall any board meeting at which that was ever discussed, must less decided. So if it was done it would have to have been done in a meeting I did not attend or wasn't aware of or after I was gone. [5 (6-9)].

It should be noted that Mr. Wilcock was present at the December 4, 1981 meeting of the Board of Directors where the retirement plan was approved and ratified [Plaintiffs' Exhibit #21] and signed the adoption agreement on behalf of Tru-Tech on December 29, 1981 [Plaintiffs' Exhibit #12].

With respect to representations made to the class concerning the pension plan, Mr. Wilcock testified as follows:

> . . . it was explained that the programs were going to be as similar as practical in their overall benefits to the Rockwell plans, but since we were a smaller company and so on, so forth, it might not be identical; but in any event, they should rest assured in this transition they would end up with the plans. [5 (20-25)].

Asked specifically about the 10 year vesting schedule he testified as follows:

> Q. Was there ever any hard and fast determination or principle on the part of the company that there would only be a 10 year vesting schedule?
>
> A. There was never—it's opposite as you can get. There was never any discussion of any technical details of the plan by the board. The whole thing was to provide the employees with a sense of security so that they would be there for the company after Rockwell sold it. [6 (1-9)].

Wilcock testified that the "broad purpose" for adopting the plan was to ensure that the salaried employees would not leave the company [8 (20)-9 (2)].

Q. From your observation was the adoption of the plan successful in that regard?

A. Sure, we didn't lose anybody. [9 (3-5)].

2. B. J. Myers, Vice President of Finance for Tru-Tech from September of 1981 through August of 1984, testified that the amendments to the pension plan changing the 10 year cliff vesting to 4-40 would not have been originated in the Tru-Tech offices where he and B. W. Wilcock worked:

Q. Where would that document have come from?

A. It would have probably come out of Buchanan Ingersoll's office or Grant Peacock's office or possibly out of the insurance company . . . . [4 (13-15)].

3. Thomas H. Bishop, Vice President of the Eckenrode Agency, was involved in the adoption of the plan. When asked whom he represented, he stated: "I feel more like I represented Tru-Tech . . . ." [7 (10)]. He testified that he prepared the amendment changing the vesting schedule at the request of the IRS [8 (16-20)]. Concerning the complexity of the amendment, he testified as follows:

I don't recall what the vesting was. They [IRS] wanted 4 and 40 rule vesting after four years, vesting after 7 years, I believe. The IRS requested that to be made. We could have gone to an attorney and drawn up a change and he would have done that amendment. Really, it's a very simple amendment to do. We went ahead and did it. [8 (19)-9 (3)].

He further testified as follows:

As far as I know, there were other amendments, and if they were very minor in nature, we could have very easily have done them. If they were not minor in nature, then, we would turn them over to a law firm to draw them up. I guess they become specific in wording. When we changed the vesting amendment, all we did is fill in the 4-40. Nothing complicated in the wording . . . . [9 (16-24)].

He further testified that it appeared to him that the Eckenrode Agency would have sent the executed vesting schedule amendments to the IRS. [15 (20-23)].

With respect to clearing the vesting schedule amendment with Robert Johnson of Buchanan Ingersoll, Tru-Tech's corporate counsel, Mr. Bishop testified as follows:

Unfortunately, I do not believe, either Bill [Wilcock] or myself had spoken to him [Robert Johnson] regarding the amendment just to be sure—maybe it was Bill that had talked to him. It was okay to go to the 4-40 and there was no reason to keep the vesting with the IRS. But, I don't recall whether I talked to him or whether Bill Wilcock talked to him. [17 (10-17)].

4. Robert A. Johnson, a partner in the Buchanan Ingersoll firm, testified that Tru-Tech's decision to revoke the plan "took into account the fact that they were cash poor." [14 (4-8)].

With respect to the correspondence between T. H. Williams and the IRS, Mr. Johnson testified as follows:

Q. Was it your impression that he [Williams] was primarily interested in obtaining an adverse determination letter?

A. I had advised him that if the Internal Revenue Service issued an adverse determination letter, then Tru-Tech had the right, under the plan, to revoke it and recover contributions . . . . [17 (11-17)].

5. The defendant Grant Peacock testified by deposition that he was aware of the fact that Tru-Tech had placed Mr. Wilcock in a position of authority to speak for the company. [35 (5-8)]. He also admitted that Mr. Wilcock had authority to deal with the salaried employees with respect to the plan. [35 (16-24)]. He further testified as follows:

Q. Did you ever tell Mr. Wilcock at any time, Mr. Wilcock, you do not have authority to make representations to the Internal Revenue Service?

A. No.

Q. Did you ever tell Mr. Wilcock at any time that as President of the corporation that he did not have authority to make representations to the beneficiaries of the plan?

A. No.

Q. Is it not true that you generally relied upon Mr. Wilcock to administer the plan?

A. Yes. [50 (9-20)].

Mr. Peacock also testified that during the history of Tru-Tech he could not remember any resolution that was introduced by him which was not unanimously adopted by the Board of Directors. [9 (6-10)]. When asked whether he ever discussed a 10 year vesting schedule with the Board, he testified as follows:

Q. Did you ever discuss a 10 year vesting schedule with the Board of Directors initially?

A. I don't know the answer to that. [12 (8-10)].

At the trial, the class representative Jack Thomas testified that throughout the period of his employment with Tru-Tech, representations were made to salaried employees concerning the existence of the plan. In addition, T. H. Williams, whom the exhibits show acted as Executive Vice President both for Tru-Tech and Grant Peacock and Co., admitted that he made no investigation whatsoever to verify the accuracy of his representations to the IRS contained in Plaintiffs' Exhibit #6 that "Mr. Wilcock had a direct financial gain associated with filing an amendment converting the vesting provisions to 4-2-2."

DISCUSSION OF THE EVIDENCE AND FINDINGS OF FACT

It is clear from the evidence that Tru-Tech represented to its salaried employees that a pension plan had been enacted for their benefit. Both Thomas and Wilcock testified that this was the case. In addition, Tru-Tech admitted

as much in their July 23, 1984 letter to the IRS stating that "we promised the salaried employees a pension plan and agreed to credit them with previous service at Rockwell for calculation of vesting." [Plaintiffs' Exhibit #17]. Wilcock testified that the purpose of this representation was to retain the key employees and that they were successful because no key employees were lost.

Therefore, I find as a fact the following:

1. Tru-Tech represented to its salaried employees that they would be covered by a pension plan similar to the plan they enjoyed with Rockwell with service at Rockwell credited toward vesting. The purpose of this plan was to induce the former Rockwell employees to remain with Tru-Tech and such purpose was successfully obtained. Tru-Tech achieved additional benefits from the existence of the plan through tax deductions. [See Plaintiffs' Exhibit #26].

With respect to the specifics of the vesting schedule, there is no reference to any discussion by the Board of Directors of any specific vesting schedule at the meeting where the plan was approved. [Plaintiffs' Exhibit #21]. Mr. Peacock testified that he could not recall any discussion of a 10 year vesting schedule with the Board of Directors [Peacock deposition, 12 (8-10)]. Mr. Wilcock testified that there was no discussion of any specific vesting schedule by the Board of Directors and it appears that almost two-thirds of the affected employees had more than 10 years of vested service by 1984 when Tru-Tech sought to scuttle the plan. [See Plaintiffs' Exhibit #1]. Therefore, it is difficult to credit Tru-Tech's contention to the IRS in Mr. Williams' July 23, 1984 letter that the 4-40 schedule would have provided at that time less "incentive to retain valuable employees." By then the vast majority of the key salaried employees listed in Plaintiffs' Exhibit #1 would have been fully vested under either schedule. The proof is much more convincing that the primary reason Tru-Tech refused to acknowledge the 4-40 amendment was to obtain a return of the pension funds. [See Plaintiffs' Exhibit #23 and testimony of Robert Johnson].

This is underscored by Mr. Williams' letter of August 22, 1984 in which he requests an adverse determination letter so that Tru-Tech "may move on to a consideration of alternative ways of providing retirement benefits for our employees." [Plaintiffs' Exhibit #8]. Admittedly this was never done.

Consequently, I find as a fact the following:

2. The Tru-Tech Board of Directors made no specific specification of a particular vesting schedule but rather gave a general approval of a pension plan using "prototype documents developed by Connecticut General Life Insurance Company." [Plaintiffs' Exhibit #21, pages 66-67].

3. Because of the extent of previous vesting service earned with Rockwell, there was no significant difference in the incentive to retain valuable employees between the 10 year cliff and 4-40 vesting schedules at the time Tru-Tech attempted to repudiate the 4-40 amendment in July through October, 1984.

4. The true reason for Tru-Tech's repudiation of the 4-40 vesting amendment was to obtain a return of the pension funds previously paid into the plan and not to provide an incentive to retain valuable employees.

In its July 23, 1984 letter to the IRS, Tru-Tech strongly implies that Mr. Wilcock as President of Tru-Tech originated the 4-40 amendment for the purpose of furthering his own financial interests. To the contrary, the evidence clearly shows that the 4-40 amendment was initiated by the IRS, drafted by the Eckenrode Agency as agent for Tru-Tech, passed by Tru-Tech's corporate counsel for approval, executed by Wilcock and Myers and then returned to IRS by Eckenrode. The Eckenrode representative testified that either he or Wilcock referred it for approval to Tru-Tech's counsel and Tru-Tech's counsel's

own notes reflect that he was advised of the proposed amendment in the spring of 1983 by B.J. Myers. [Plaintiffs' Exhibit #23, ¶ 3].

Therefore, based on this evidence, I make the following additional finding of fact:

5. The 4-40 vesting amendment was requested by IRS, prepared by Tru-Tech's insurance agent, approved by Tru-Tech's counsel, executed by Tru-Tech's executive officers Wilcock and Myers, and returned to IRS by Tru-Tech's insurance agent.

The next question concerns the authority of Wilcock and Myers to execute the amendment. As executive officers of Tru-Tech they had previously been given authority by the Board of Directors to execute technical and administrative amendments which may be requested by IRS. In the sense that it is used here, I interpret the term "technical" to refer to the degree of substance or materiality of the amendment. While vesting provisions certainly may be considered to be substantive as opposed to technical in some situations, as where there is no previous credit toward vesting, there are other situations where vesting amendments are obviously technical.

If all the key employees had 10 years of service and were therefore vested under either schedule, it would be difficult to argue that the amendment would be material and therefore substantive as opposed to technical. Here it appears that at least two-thirds of the key employees would have been vested under either schedule, if not at the time of the amendment in September of 1983, certainly by the time the amendment was repudiated by Tru-Tech in the period of July through October of 1984. Therefore, under the circumstances, I have concluded that the amendment from 10 year cliff to 4-40 vesting was more technical than substantive in light of the fact that the vast majority of the key employees as reflected in

Plaintiffs' Exhibit #1 would have been vested under either schedule.

This finding is consistent with Plaintiffs' Exhibit #22 which Tru-Tech Chairman Grant Peacock presented "several technical amendments" including an amendment to the hourly pension plan changing the "service requirement" from 10 to 15 years. [See Plaintiffs' Exhibit #22, page 342]. The "service requirement" is similar in substance to the vesting schedule and, if a change in the "service requirement" is a "technical amendment," it follows that an amendment changing the vesting schedule may be technical as well.

In addition, it is the general rule that a corporation may be bound where its officer or agent acts without, or in excess of, his actual authority if he acts within the scope of apparent authority with which his corporation has clothed him. See *C.J.S.* Corporations § 994. Here the defendant Grant Peacock as Chairman of the Board of Tru-Tech has testified that he generally relied upon Mr. Wilcock to administer the plan and that he never attempted to limit Wilcock's authority to make representations to the IRS or to the beneficiaries of the plan. [See testimony of Peacock, *infra.*].

Therefore, I make the following additional findings of fact:

6. The September 14, 1983 amendment to the Tru-Tech pension plan as set forth in Plaintiffs' Exhibit #4 converting to a 4-40 vesting schedule was, under the circumstances, a technical amendment within the meaning of the December 4, 1981 resolution of the Tru-Tech Board of Directors as set forth in Plaintiffs' Exhibit #21 at page 67.

7. Wilcock and Myers had both actual and apparent authority to bind Tru-Tech in its dealings with and representations to IRS and the plan beneficiaries with reference to the existence of the Tru-Tech salaried pension plan and the validity of the 4-40 vesting amendment.

29 *U.S.C.* § 1053(c) specifically provides that once a vesting schedule becomes effective, it cannot be changed to a less favorable vesting schedule. Obviously the 10 year cliff vesting schedule is less favorable than the 4-40. Therefore, the question arises as to whether the 4-40 vesting schedule amendment became effective. The pension plan [Plaintiffs' Exhibit #13] in paragraph 15.7 on page 34 provides for approval by the Internal Revenue Service as follows:

> Notwithstanding any other provisions of this Plan, the Employer's adoption of this Plan is subject to the condition precedent that the Employer's Plan shall be approved and qualified by the Internal Revenue Service as meeting the requirements of § 401(a) of the Internal Revenue Code . . . .

The plaintiffs contend that the plan was "approved and qualified" within the meaning of this section and defendants contend that it was not. The Plaintiffs point to the language of the attachment to the initial IRS adverse determination letter stating that "the waiver of minimum funding and the amendment to the plan was approved on 5/30/84 as a National Office Technical Advice Memorandum" [Plaintiffs' Exhibit #11, page 38]. They also point to the language of Tru-Tech's July 23, 1984 letter which specifically states that following the 4-40 amendment "the IRS subsequently approved the plan. [Plaintiffs' Exhibit #6].

Paragraph 15.7 of the plan makes no reference to a "final approval" by IRS but only to an approval and qualification by IRS that the plan is "meeting the requirements of § 401(a) of the Internal Revenue Code." It is obvious from the language of Plaintiffs' Exhibit #11 that following the 4-40 amendment the plan received at least preliminary approval by the IRS and it is further

obvious that after the 4-40 amendment the plan did meet the requirements of § 401(a) of the Internal Revenue Code. For this reason, I have concluded that the plan did, in fact, receive the "approval by the Internal Revenue Service" specified in paragraph 15.7 and further that after such approval the attempted reversion to the 10 year cliff vesting schedule [See Plaintiffs' Exhibit #10] was invalid under paragraph 15.3 of the plan which provides as follows:

> CONDITIONS OF AMENDMENT. Neither the Sponsor nor Employer shall make any amendment which would cause the Plan to lose its status as a qualified plan within the meaning of § 401(a) of the Internal Revenue Code. [Plaintiffs' Exhibit #13, page 33].

Based on the above, I make the following additional findings of fact:

8. Following the adoption of the 4-40 vesting schedule the plan did, in fact, meet the requirements of § 401(a) of the Internal Revenue Code and was, in fact, approved and qualified by the Internal Revenue Service within the meaning of paragraph 15.7 of the plan.

9. The subsequent attempted amendment by the Tru-Tech Board of Directors back to the 10 year cliff vesting schedule was invalid under the provisions of paragraph 15.3 of the plan.

With respect to the question of who are plan fiduciaries, section 1.26 of the plan states that the term fiduciary includes any fiduciary "designated by the employer in its adoption agreement." [Plaintiffs' Exhibit #13, page 5]. The adoption agreement designates Tru-Tech as the named fiduciary [Plaintiffs' Exhibit #12, page 4, ¶ VIII]. The question remains as to whether the remaining defendants exercised discretionary authority or control over the management or administration of the plan or the disposition of its assets.

While Tru-Tech shared offices in Pittsburgh with Grant Peacock & Co., Inc. and certain individuals were officers of both companies, there is no suggestion that Grant Peacock & Co., Inc. exercised any authority or control in connection with the Tru-Tech salaried pension plan or for that matter, any of the affairs of Tru-Tech.

Grant Peacock's position as a director and officer of Tru-Tech would not alone be sufficient to make him a fiduciary. The Labor Department in an interpretative bulletin addressing this issue states in part as follows:

> D-4 Q: In the case of a plan established and maintained by an employer, are members of the board of directors of the employer fiduciaries with respect to the plan?
>
> A. Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries *only to the extent that they have responsibility for the functions described in Section 3(21)(A) of the Act.*
>
> * * *
>
> D-5 Q: Is an officer or employee of an employer or employee organization which sponsors an employee benefit plan a fiduciary with respect to the plan solely by reason of holding such office or employment if he or she performs none of the functions described in Section 3(21)(A) of the Act?
>
> A: No. . . .

ERISA Interpretative Bulletin 75-8, 29 C.F.R. § 2509. 75-8 (1983) (emphasis added). A number of circuit courts have adopted the same or a similar approach. *See, e.g., Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 884 (1987), 107 S.Ct. 1298 (1987); *Trenton v. Scott Paper Co.*, 832 F.2d 806 (3rd Cir. 1987).

Even where an individual or corporation is a plan fiduciary, not all actions are fiduciary in nature:

> When an employer acts as a plan fiduciary, it wears "two hats," and assumes fiduciary status only when it functions as a fiduciary and not when it is conducting business not regulated by ERISA. The Department of Labor has taken the position that "settlor functions" relating to the formation, design and termination of plans are not fiduciary activities.

Ogden v. Michigan Bell Telephone Co., 657 F.Supp. 328, 333 (E.D. Mich. 1987) (citations omitted).

At most, Grant Peacock, as chairman of the board of Tru-Tech, was involved along with the other members of the board of directors in the business decisions relating to the formation and design of the salaried pension plan. These were not fiduciary decisions, but were business decisions relating to the design features of the pension plan. Therefore, I make the following finding of fact:

10. Neither D. Grant Peacock & Co. nor D. Grant Peacock exercised discretionary authority and control over the management and administration of the plan and the disposition of its assets.

Based on the above findings of fact, I make the following conclusions of law on the issue of liability:

CONCLUSIONS OF LAW

1. The purpose of ERISA is to protect the interest of the participants in the pension plan. *See* 29 *U.S.C.* 1001(b). Section 1104(a) provides that a fiduciary should discharge his duties with respect to the plan solely for the interest of the participants and beneficiaries and for the *exclusive* purpose of providing benefits. In addition, Article XI, § 11.1 of the plan provides as follows:

> GENERAL FIDUCIARY STANDARD OF CONDUCT. Each Fiduciary of the Plan shall discharge his duties hereunder solely in the interest of the Participants and their Beneficiaries and for the exclusive purpose of providing benefits to Participants and their Beneficiaries and defraying reasonable expenses of administering the Plan . . . . [Plaintiffs' Exhibit #13, page 27].

2. The defendant Tru-Tech constituted a fiduciary of the plan within the meaning of 29 *U.S.C.* § 1002(21)(A). Neither D. Grant Peacock & Co. nor D. Grant Peacock were fiduciaries under that section.

3. As a fiduciary, Tru-Tech may be liable under 29 *U.S.C.* § 1109(a) which provides as follows:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this [Act] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . .

4. Tru-Tech represented to the plan participants that the plan was in effect and they relied upon such representation.

5. The 4-40 vesting amendment executed on September 14, 1983 [Plaintiffs' Exhibit #4] was valid and resulted in an approval by the Internal Revenue Service within the meaning of paragraph 15.7 of the plan.

6. The amendment by which Tru-Tech attempted to revert to the 10 year cliff vesting schedule violated the provisions of paragraph 15.3 of the plan and of 29 *U.S.C.* § 1053(c) and was therefore invalid.

7. The resulting return of the plan proceeds to Tru-Tech and Tru-Tech's failure to fund the plan as provided in the plan documents were the result of a breach of fiduciary duty by Tru-Tech, which proximately resulted in damages to the plan and its beneficiaries.

8. The common law claims of fraud and civil conspiracy (Counts III and IV) are pre-empted by ERISA. *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct. 1549, 1553 (1987); *Salomon v. Transamerica Occidental Life Ins. Co.*, 801 F.2d 659, 660-61 (4th Cir. 1986).

9. The class is therefore entitled to damages, attorneys fees and costs under 29 *U.S.C.* § 1132(g) as to Counts I and II (ERISA).

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO DAMAGES

The plaintiffs' expert on damages was Ralph Sayre, an actuary who specializes in administration and valuation of pension plans. Mr. Sayre testified that he had been furnished appropriate payroll records of Tru-Tech together with the interest rates the pension funds would have earned had they been properly invested with Connecticut General. According to Mr. Sayre's report [Plaintiffs' Exhibit #25] the class members would be entitled to damages in the amount of $205,407.20 as of December 31, 1987. A copy of Mr. Sayre's schedule of damages is attached as Exhibit A. Mr. Sayre's report reflects that all participants in the pension plan were terminated after Tru-Tech went out of business during the 1984 plan year. He testified that due to the large number of terminated employees, he treated the plan as having a "partial termination" which results in all employees being 100% vested. This treatment is consistent wtih § 15.5 of the plan [Plaintiffs' Exhibit #13] which provides that upon a "partial termination" of the plan all participants shall be 100% vested and entitled to a distribution of their account.

Based on the above, I make the following findings of fact regarding damages:

1. All class participants as reflected on Exhibit A are 100% vested in their account balances.

2. The schedule of class participants account balances as reflected on Exhibit A in the amount of $205,407.20 is the amount of damages the class is entitled to as of December 31, 1987 and it also correctly reflects the damages recoverable by each member of the class.

3. The defendants are also liable for pre-judgment interest from December 31, 1987. The *52 Week T-Bill Rate Changes, January 1, 1975 to Date*, issued by the Administrative Office of the United States Courts reflect that the rate on January 14, 1988 was 7.14%. Applying this rate to the damages of $205,407.20 from January 1 through October 30, 1988, yields $12,221.73 of applicable pre-judgment interest, thereby entitling the class participants to a total sum of $217,628.93. Prior to trial, the plaintiffs settled with the defendant Connecticut General for the sum of $30,000.00, which has previously been approved by the court. Accordingly, Tru-Tech is liable for the sum of $187,628.93.

4. 29 *U.S.C.* Section 1132(g) provides for reasonable attorneys fees and costs. I find that plaintiffs are entitled to reasonable attorneys fees and costs. The attorneys for the plaintiff class shall submit their petition for attorneys fees and costs within 45 days of the date of this order.

Based on the above, the Clerk of Court shall enter judgment against the defendant Tru-Tech, Inc. in the amount of $187,628.93. The plaintiff shall have no judgment against the defendant D. Grant Peacock and D. Grant Peacock & Co.

IT IS SO ORDERED.

/s/ G. Ross Anderson, Jr.
G. Ross Anderson, Jr.
United States District Judge

Anderson, South Carolina

Nov. 28, 1988.

EXHIBIT A

	Last Name	First Name	Soc. Sec. #	Total Account	Vested Percentage	Vested Benefit
1	ALLEN	F. L.	034-22-5455	747.25	100%	747.25
2	ALLEN	JASPER E.	249-78-4126	4,631.56	100%	4,631.56
3	BERG	W.		0.00	100%	0.00
4	BLACKBURN	JOHN H.	024-32-3447	20,302.49	100%	20,302.49
5	BRITT	RONALD	249-96-5942	479.21	100%	479.21
6	BURZYSKI	MARK	059-46-6121	1,730.05	100%	1,730.05
7	CANTERBURY	JOHN D.	235-42-5105	5,772.19	100%	5,772.19
8	CAPPS	JERALDINE	250-64-5599	2,944.63	100%	2,944.63
9	CATOE	BRUCE	249-76-4858	1,980.34	100%	1,980.34
10	CLARK	V.		0.00	100%	0.00
11	COLCORD	WALLACE	013-24-5574	7,348.69	100%	7,348.69
12	COLLINS	CLYDE	247-64-8262	7,523.95	100%	7,523.95
13	COLLINS	J. M.	247-90-8241	2,989.24	100%	2,989.24
14	COLLINS	LUNNETTE	247-66-5871	2,477.87	100%	2,477.87
15	DEW	JAMES E.	250-62-0426	1,445.04	100%	1,445.04
16	DICKERSON	JEROME	249-86-7935	4,416.61	100%	4,416.61
17	DALE	CHRISTINE I.	492-22-1158	3,302.36	100%	3,302.36
18	DOOLAN	DAVID W.	003-30-7544	6,155.78	100%	6,155.78
19	ELMORE	JOHN C.	249-66-4987	1,508.50	100%	1,508.50
20	ELVIS	GEROY	247-66-8833	5,289.88	100%	5,289.88
21	ERVIN	FARRIS, JR.	238-34-7357	1,931.13	100%	1,931.13
22	FORTNER	SHELBY	248-74-5495	1,060.27	100%	1,060.27
23	GERALD	BETTY B.	248-68-1302	2,171.91	100%	2,171.91
24	GILPATRICK	D. M.	001-38-4776	0.00	100%	0.00
25	GILPATRICK	L.		0.00	100%	0.00

26	GROSS	ARTHUR L.	003-14-9144	3,453.05	100%	3,453.05
27	HARDEE	EDNA	249-68-8227	2,157.13	100%	2,157.13
28	HERLONG	ALICE P.	251-82-0429	2,809.32	100%	2,809.32
29	HERLONG	HAROLD B.	247-74-3454	4,867.75	100%	4,867.75
30	HOOKS	BRENDA	251-82-0104	2,278.53	100%	2,278.53
31	HULON	BARBARA C.	248-74-1502	5,076.48	100%	5,076.48
32	HUMPHRIES	MILDRED W.	250-32-7265	381.49	100%	381.49
33	HURD	B. J.	230-20-4956	3,787.36	100%	3,787.36
34	HUSKEY	MARTHA A.	250-68-7147	3,409.30	100%	3,409.30
35	JOHNSON	BETTY H.	250-64-6417	1,900.25	100%	1,900.25
36	JOHNSON	MARJORIE	250-52-5727	536.93	100%	536.93
37	KAZAN	THEODORE S.	037-26-0205	4,579.05	100%	4,579.05
38	KENNEDY	ROBERT D.	021-36-6850	4,499.19	100%	4,499.19
39	KUZDEBA	RAYMOND J.	039-30-2741	10,504.07	100%	10,504.07
40	LANE	GLENN O.	048-44-3439	4,768.37	100%	4,768.37
41	MARDIN	RICHARD E.	003-28-9271	3,217.07	100%	3,217.07
42	McBRIDE	ROGER A.	002-16-2531	0.00	100%	0.00
43	McKEKING	ALVIN		0.00	100%	0.00
44	McKENZIE	DAYTON E.	248-56-2699	0.00	100%	0.00
45	McKENZIE	DENNIS R.	003-26-4464	4,000.62	100%	4,000.62
46	McKINNON	DEAN G.	001-38-4805	3,813.09	100%	3,813.09
47	MILTON	BERNARD L.	003-22-2970	1,314.01	100%	1,314.01
48	MYERS	B. J.	241-70-5412	3,336.70	100%	3,336.70
49	PERKINS	DEAN G.	024-30-9025	0.00	100%	0.00
50	PRINCE	LOLA	251-30-4385	2,450.64	100%	2,450.64
51	PULLEY	ROGER	250-63-7339	4,918.10	100%	4,918.10
52	ROGERS	A. G.	249-56-3498	1,481.20	100%	1,481.20
53	ROGERS	JERRY	248-62-4982	2,929.12	100%	2,929.12
54	SANDERS	H. T.	421-58-0324	4,345.28	100%	4,345.28

	Last Name	First Name	Soc. Sec. #	Total Account	Vested Percentage	Vested Benefit
55	SAVELLI	JOHN N.	019-20-7115	6,479.14	100%	6,479.14
56	SEIFERT	RICHARD	379-24-0326	2,210.27	100%	2,210.27
57	SHAUGHNESSY	STEPHEN	003-40-7962	4,570.54	100%	4,570.54
58	THOMAS	JACK L.	239-34-4694	15,120.95	100%	15,120.95
59	THOMAS	MILES	249-09-7211	3,595.91	100%	3,595.91
60	THOMPSON	GREGORY	002-42-7972	0.00	100%	0.00
61	THOMPSON	SANDRA L.	251-92-8998	1,004.10	100%	1,004.10
62	TOBINE	KATHRYN G.	002-46-7915	1,980.25	100%	1,980.25
63	UHLMAN	LEROY P.	003-28-5058	5,025.91	100%	5,025.91
64	VERNER	KINSEY	247-02-0827	0.00	100%	0.00
65	WEBSTER	WALTER	340-42-0464	4,472.53	100%	4,472.53
66	WEST	VIVIAN	250-62-9734	2,166.40	100%	2,166.40
67	WHITE	LAURA H.	251-48-6187	6,415.92	100%	6,415.92
68	WILCOCK	B. W.	562-56-2443	16,146.45	100%	16,146.45
69	YELTON	BARRY	238-74-4290	0.00	100%	0.00
70	ZWICKER	THOMAS J.	002-42-5069	2,372.28	100%	2,372.28
				244,584.00		244,583.71

DEDUCTION FOR

F.L. ALLEN	747.25
J. H. BLACKBURN	20,302.49
B. CATOE	1,980.34
B. W. WILCOCK	16,146.45
TOTAL	39,176.52

NET 205,407.20

(AS OF 12/31/87)

/s/ Ralph J. Sayre
RALPH J. SAYRE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2001

JACK L. THOMAS, Individually, on behalf of the Tru-Tech, Inc., Pension Plan, and as Representative of Class of Plaintiffs Similarly Situated,

Plaintiff-Appellant,

versus

TRU-TECH, INC.; D. GRANT PEACOCK; GRANT PEACOCK AND COMPANY, INC.,

Defendants-Appellees,

and

CONNECTICUT GENERAL LIFE INSURANCE COMPANY,

Defendant.

No. 89-2003

JACK L. THOMAS, Individually, on behalf of the Tru-Tech, Inc., Pension Plan, and as Representative of Class of Plaintiffs Similarly Situated,

Plaintiff-Appellee,

versus

TRU-TECH, INC.,

Defendant-Appellant,

and

D. GRANT PEACOCK, GRANT PEACOCK AND COMPANY, INC.; CONNECTICUT GENERAL LIFE INSURANCE COMPANY,

Defendants.

Appeals from the United States District Court
for the District of South Carolina, at Spartanburg.
G. Ross Anderson, Jr., District Judge. (CA-87-2243-3)

Argued: January 10, 1990 Decided: April 3, 1990

Before RUSSELL and CHAPMAN, Circuit Judges, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

CHAPMAN, Circuit Judge:

This appeal arises out of a class action brought by Jack L. Thomas ("Thomas") against Tru-Tech, Inc. ("Tru-Tech"), D. Grant Peacock ("Peacock"), Grant Peacock and Co. Inc. ("GP&C") and Connecticut General Life Insurance Company ("CGLIC") alleging, *inter alia*, breach of fiduciary duty under the Employment [*sic*] Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* (1989) ("ERISA"). The district court, following a trial to the bench, held Tru-Tech liable for breach of fiduciary duty, but found that Peacock and GP&C were not fiduciaries under the Plan and thus could not be liable for breach of fiduciary duty. Thomas appeals, arguing that the district court erred in finding that Peacock and GP&C were not fiduciaries. Tru-Tech appeals, arguing that the district court erred in finding that the amend-

ment to the Plan was authorized by Tru-Tech's Board of Directors and that Tru-Tech's Plan was approved by the IRS. We conclude that the district court did not clearly err as to its findings of fact and made no errors of law.

I

Located in Spartanburg, South Carolina, Tru-Tech was formed in 1981 to take over a textile machinery business previously operated by Rockwell International Corporation. Tru-Tech's Chairman of the Board was Peacock, who also owned and operated GP&C, a Pittsburgh company that was initially a business brokerage business and later a company managing other business interests of Peacock and his business associates. Tru-Tech shared offices in Pittsburgh with GP&C.

In a resolution of the Board of Directors dated December 4, 1981, Tru-Tech adopted a pension plan for its salaried workers ("Plan"). This Plan provided for ten-year "cliff" vesting under which an employee would become fully vested following ten years of service. The Board did not discuss or specify the "cliff" vesting schedule, but gave its general approval of the Plan. Although it stated an effective date of October 1, 1981, the adoption of the Plan was "subject to the condition precedent that the Plan shall be approved and qualified by the Internal Revenue Service." The Board of Directors also resolved that "such executive officers are hereby authorized to make such technical or administrative amendments to the Plans . . . as they in their discretion deem advisable or as may be requested by the Internal Revenue Service or other governmental authorities."

The adoption agreement was subsequently executed on December 29, 1981, by Bill Wilcock, President of Tru-Tech. However, Tru-Tech did not submit the Plan to the IRS for approval until December 31, 1982, and the IRS informed Tru-Tech on July 21, 1983, that the cliff vesting schedule was not acceptable and that a vesting

period at least as liberal as a 4-40 vesting schedule was required; under such schedule, covered employees would become 40% vested after four years and 100% vested after eleven years. Wilcock and B. J. Myers, Assistant Secretary of Tru-Tech, executed an amendment to the Plan on September 14, 1983, in which a 4-40 vesting schedule was adopted. The IRS's records indicate that this "amendment to the plan was approved on 5/30/84 as a National Office Technical Advice Memorandum." The amendment, while not approved by the Board, was prepared by Tru-Tech's insurance agent and approved by Tru-Tech's counsel.

Meanwhile, Tru-Tech had serious financial problems because of continuing operating losses and obtained a funding waiver, allowing it to stop funding the Plan. Peacock testified that the declining business situation led to conflict between Wilcock and the Board, resulting in his resignation within weeks of the amendment to the Plan. At that point, T. H. Williams, who was Vice President of GP&C, became Executive Vice President of Tru-Tech. Unaware of the amendment made by Wilcock and Myers, Williams notified the Board of the IRS's rejection of the cliff vesting schedule. The Board decided against any change in the Plan and resolved on April 17, 1984, that the Plan "will be terminated and replaced with a profit sharing plan." After discovering the existence of the amendment, Williams wrote the IRS in July, August, and October of 1984, advising that the amendment was not approved by the Board and requesting an adverse determination. The IRS issued its proposed adverse determination on January 31, 1985, which, since no appeal was taken, became final on May 23, 1985. As a result, the Plan was terminated and its assets were refunded to Tru-Tech with interest.

Thomas brought this class action on August 24, 1987. After a one-day bench trial, the district court held on August 31, 1988, that Tru-Tech had breached its fiduciary

duty under the Plan and ERISA and awarded the plaintiffs $187,628.93 and attorney's fees. In particular, the district court found that Tru-Tech's amended Plan was approved and qualified by the IRS and that Tru-Tech's attempt to revert to the cliff vesting schedule was done to bring about a termination of the Plan and a return of its funds. However, the court held that Peacock and GP&C were not fiduciaries under the Plan and could not be liable for breach of fiduciary duty.

II

Thomas argues that the district court clearly erred in finding that neither Peacock nor GP&C were liable as fiduciaries under ERISA. The Act allows suits for breach of fiduciary duty only against persons who are fiduciaries. 29 U.S.C. § 1109(a) (1989); *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1324-25 (9th Cir. 1985). To identify a fiduciary, one looks first to the terms of the plan, which must "provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1). *See also* ERISA Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8 (1983) ("Each plan must, of course, have at least one named fiduciary . . . ."). If a plan designates a person or entity a "named fiduciary," then such person or entity is presumptively a fiduciary and subject to liability under ERISA. *See Yeseta v. Baima*, 837 F.2d 380, 384 (9th Cir. 1988). In this case, Paragraph 1.26 of the Plan states that the term "named fiduciary" means "the Administrator and any other Fiduciary designated by the employer in its adoption agreement and any successor thereto." The Adoption Agreement designated Tru-Tech as the administrator and named fiduciary, and Tru-Tech subsequently appointed W. A. Williams as Plan Administrator at its December 4, 1981, board meeting. Thus, neither Peacock nor GP&C are fiduciaries within the express terms of the Plan.

However, analysis does not stop here. The Act extends the scope of the term "fiduciary" to those who actually exercise discretionary authority, control or responsibility over a plan. Section 1002(21)(A) defines a fiduciary as follows:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). The phrase "to the extent" indicates that "in defining 'fiduciary' Congress was peculiarly concerned with realities, as distinguished from mere formalities." *Fulk v. Bagley*, 88 F.R.D. 153, 162 ((M.D.N.C. 1980). We must focus "on the function performed, rather than on the title held." *Blatt v. Marshall and Lassman*, 812 F.2d 810, 812 (2d Cir. 1987). *See also* H.R. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 5038, 5103 ("[T]he definition includes persons who have authority and responsibility with respect to the matter in question, regardless of their formal title.").

As a result of this pragmatic inquiry, a person not designated as a fiduciary by a plan may yet be a fiduciary under ERISA if that person exercises powers listed in Section 1002(21)(A). However, an officer or director of a corporation is not a fiduciary merely because of his or her position in the corporation, as an interpretive bulletin issued by the Labor Department explains. This bulletin reads in pertinent part:

> D-4 Q: In the case of a plan established and maintained by an employer, are members of the board of directors of the employer fiduciaries with respect to the plan?

A: Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have responsibility for the functions described in section [1002](21)(A) of the Act.

* * *

D-5 Q: Is an officer or employee of an employer or employee organization which sponsors an employee benefit plan a fiduciary with respect to the plan solely by reason of holding such office or employment if he or she performs none of the functions described in Section [1002](21)(A) of the Act?

A: No.

ERISA Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8 (1983). But an officer or director actually exercising fiduciary, rather than corporate, powers is subject to ERISA liability as a fiduciary. *See, e.g., Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1522 (11th Cir. 1985) (where court held that the corporate executive, who was "acting as a fiduciary," was liable "whatever his title, or whether he was named as a fiduciary or not . . . .").

Thomas argues that Peacock, although not designated a fiduciary, exercised fiduciary power by allegedly executing the ten-year cliff vesting amendment which led to the termination of the Plan.[1] However, the district court held that Peacock acted solely in his capacity as Chairman of the Board of Tru-Tech, not as a fiduciary of the Plan. Indeed, the record reveals that Tru-Tech's Board of Directors resolved in a meeting on October 11, 1984, to retain the ten-year cliff vesting schedule. Conceding this,

[1] Thomas also argues that Peacock exercised fiduciary power by misrepresenting to the IRS that the 4-40 vesting schedule amendment lacked proper approval of Tru-Tech's Board of Directors. However, the district court found that T. H. Williams, not Peacock, made this statement, whether or not a misrepresentation, in his correspondence with the IRS in the latter half of 1984.

Thomas insists that Peacock, as the principal investor, dominated the Board and had de facto power to make these decisions concerning the Plan. But this influence has scant evidentiary support and does not contradict the finding that these decisions were made by the Board, not Peacock acting unilaterally. Thus, Thomas fails to demonstrate that the district court clearly erred in finding that Peacock did not possess sufficient discretionary authority and control over the Plan to make him a fiduciary.

Regarding the status of GP&C as an ERISA fiduciary, the district court held that "[w]hile Tru-Tech shared offies in Pittsburgh with [GP&C] and certain individuals were officers of both companies, there is no suggestion that [GP&C] exercised any authority or control in connection with the Tru-Tech salaried pension plan or for that matter, any of the affairs of Tru-Tech." Thomas failed to give any evidence linking GP&C with Tru-Tech's decision to adopt the ten-year cliff vesting schedule or with any affairs of Tru-Tech, other than the fact that both Peacock and Williams were officers of GP&C, and the district court did not err in finding this unpersuasive.[2]

II.

The district court held that Tru-Tech's attempt to change from the 4-40 vesting schedule to the less favorable ten-year cliff vesting schedule violated not only Paragraph 15.3 of the Plan,[3] but also 29 U.S.C. § 1053(c), which

[2] Alternatively, Thomas argues that even if Peacock and GP&C are not fiduciaries, "they are liable as nonfiduciaries who knowingly participated in the fiduciary's breach of duty." Since this argument was not raised before the district court, we decline to consider it on appeal. *Farish v. Courion Industries, Inc.*, 754 F.2d 1111, 1118 (4th Cir. 1985) ("[We] will not, in the absence of clear error, consider issues not raised in the court below").

[3] Paragraph 15.3 of the Plan provides as follows:

CONDITIONS OF AMENDMENT: Neither the Sponsor nor Employer shall make any amendment which would cause the Plan to lose its status as a qualified plan within the meaning of § 401(a) of the Internal Revenue Code.

states that once a vesting schedule becomes effective, it cannot be changed to a less favorable vesting schedule.[4] In its cross-appeal, Tru-Tech argues that two of the district court's factual findings underlying this holding are erroneous: (a) that Wilcock and Myers had the authority to execute the 4-40 vesting schedule amendment and thereby bind Tru-Tech (Findings of Fact ##5, 6 & 7); and (b) that the IRS approved the 4-40 vesting schedule (Finding of Fact #8).

A. The Validity of the 4-40 Amendment

The district court found as a matter of fact that the amendment by Wilcock and Myers changing the Plan from the ten-year cliff vesting schedule to the 4-40 schedule was valid because they had the actual and apparent authority to make such an amendment. At a meeting on December 4, 1981, Tru-Tech's Board resolved that its executive officers, including Wilcock and Myers, were

> authorized to make such technical and administrative amendments to the Plans . . . as they in their discretion deem advisable *or* as may be requested by the Internal Revenue Service or other governmental bodies.

(Emphasis added.) Finding that the 4-40 vesting schedule amendment was technical in that "the vast majority of the key employees . . . would have been vested under either schedule," the court held that the amendment was a valid exercise of Wilcock's and Myers' authority. Tru-Tech argues that the 4-40 amendment was clearly substantive in nature because "[w]hile approximately 50% of the employees were fully vested under the ten year cliff vesting provided in the Plan as originally adopted, some 80% of the employees would have already achieved vesting at the 40% level at the time they entered employment at Tru-Tech." Although Tru-Tech's statistical formulation provides another way of looking at the amendment, it does not directly contradict the district court's own analysis. We find persuasive the fact that this amendment was requested by the IRS, and Wilcock and Myers were merely complying with the aforementioned Board resolution in going along with an IRS request. Therefore, we cannot say that this finding was clearly erroneous.

[4] Section 1053(c)(a)(A) states in part:

> A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) of this section if the nonforfeitable percentage of the accrued benefit derived from employer contributions . . . of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment.

B. IRS Approval

The second finding crucial to the district court's holding is whether the 4-40 vesting schedule amendment resulted in the Plan becoming effective. In addressing this issue, the district court looked to Paragraph 15.7 of the Plan, which covers approval by the Internal Revenue Service:

> Notwithstanding any other provisions of this Plan, the Employer's adoption of this Plan is subject to the condition precedent that the Employer's Plan shall be approved and qualified by the Internal Revenue Service as meeting the requirements of section 401(a) of the Internal Revenue Code.

The district court found that "[f]ollowing the adoption of the 4-40 vesting schedule the plan did, in fact, meet the requirements of § 401(a) of the Internal Revenue Code and was, in fact, approved and qualified by the [IRS]."

This finding is not clearly erroneous. In the IRS' proposed adverse determination letter to Tru-Tech, apparently dated January 31, 1985, the IRS indicated that it had previously approved the 4-40 vesting schedule amendment:

> The waiver of minimum funding and the amendment to the plan was approved on May 30, 1984 as a National Office Technical Advice Memorandum. The file was subsequently returned to the Atlanta Key District EP/EO Division for consideration of the response by the National Office in their Technical Advice Memorandum.

In its letter to the IRS dated July 23, 1984, T.H. Williams, Executive Vice President of Tru-Tech, said that the "IRS subsequently approved the plan." Tru-Tech contends that this approval was preliminary, not final, because the IRS rejected the Plan in the very same letter. Yet Tru-Tech provides no argument as to why this approval, even if preliminary, did not satisfy the requirements of Paragraph 15.7 of the Plan, as the district court held. Indeed, nothing in Paragraph 15.7 dictates that the IRS' approval be written or final. Tru-Tech also points out that Williams testified that his statement that the IRS had approved the Plan was erroneous. However, we see no reason to disturb the district court's implicit rejection of the credibility of this testimony.

III

For the above reasons, we affirm the judgment of the district court.

AFFIRMED

[Filed Feb. 7, 1992]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Case Number: 7:91-3843-3

JACK L. THOMAS, Individually, or behalf of the Tru-Tech, Inc. Pension Plan, and as a Representative of a Class of Plaintiffs similarly situated,

v.

D. GRANT PEACOCK and ALAN H. FINEGOLD.

FIRST AMENDED SUMMONS
IN A CIVIL ACTION

TO: DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon plaintiff's attorney

J. Kendall Few
850 Wade Hampton Boulevard
Post Office Box 10085
Greenville, SC 29603

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ Ann A. Birch
Clerk

Date Feb. 7, 1992

/s/ Kathy Tisdale
By Deputy Clerk

[Filed Feb. 7, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

C/A No: 7:91-3843-3

JACK L. THOMAS, Individually, on behalf of the Tru-Tech, Inc. Pension Plan, and as a Representative of a Class of Plaintiffs Similarly Situated,
Plaintiffs,

vs.

D. GRANT PEACOCK and ALAN H. FINEGOLD,
Defendants.

FIRST AMENDED COMPLAINT

1. Plaintiff is a resident of the Spartanburg Division.

2. Tru-Tech, Inc. is a Delaware corporation doing business in the Spartanburg Division.

3. D. Grant Peacock is a resident of Pennsylvania who formerly served as Chief Executive Officer and controlling shareholder of Tru-Tech, Inc.

4. Alan H. Finegold is a resident of Pennsylvania and a partner in the law firm of Kirkpatrick & Lockhart, Attorneys at Law, of Pittsburgh, Pennsylvania.

FOR A FIRST CAUSE OF ACTION

(Civil Conspiracy and Fraudulent Transfer)

5. On August 20, 1987, Plaintiffs filed an action against Tru-Tech, Inc., D. Grant Peacock, Grant Peacock & Co., Inc., and others in this Court, C/A #: 7:87-2243-3. This complaint alleged a cause of action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* for breach of fiduciary duty in the administration of the Tru-Tech, Inc. Pension Plan. This action was certified as a class action and, in November of 1988, the class obtained a judgment against Tru-Tech, Inc. for $187,500, which remains unsatisfied.

6. At or about the time of the entry of this judgment, D. Grant Peacock and others entered into a civil conspiracy, the purpose and effect of which was to make fraudulent and preferential transfers of assets from Tru-Tech, Inc. in order to defeat Plaintiffs' claims as judgment creditors.

7. The same considerations that warranted class certification in C/A No. 7:87-2243-3 exist in this action. That is, Plaintiff Thomas is a former employee of Tru-Tech, Inc. and a beneficiary of the Tru-Tech, Inc. Pension Plan. This action is brought individually, on behalf of the Tru-Tech, Inc. Pension Plan, and as a class action on behalf of all other former employees of Tru-Tech, Inc., who are beneficiaries of the Tru-Tech, Inc. Pension Plan to collect their judgment on the following grounds:

(a) The Class is so numerous that joinder of all members is impracticable;

(b) There are questions of law and fact common to the Class;

(c) The claims of the Plaintiff are typical to the claims of the Class;

(d) The Representative Plaintiff will fairly and adequately protect the interests of the Class;

(e) Common questions of law and fact predominate over individual issues.

8. During the period following the entry of this judgment, Alan H. Finegold, as a partner of Kirkpatrick & Lockhart, represented and advised D. Grant Peacock and

Grant Peacock & Co., Inc., in connection with this judgment. Beginning in or before March of 1989, Alan H. Finegold entered into the civil conspiracy alleged in ¶ 6 above, the purpose and effect of which was to make fraudulent and preferential transfers of assets from Tru-Tech, Inc. in order to defeat Plaintiffs' claims as judgment creditors.

9. Pursuant to this conspiracy, D. Grant Peacock and Alan H. Finegold committed certain specific acts, unlawful in nature and illegal in purpose, the specific intent of which was to damage the rights of the Plaintiff Class as judgment creditors. The specific acts done pursuant to this civil conspiracy included the following:

(a) On or about December 13, 1988, Tru-Tech, Inc. received $107,500 as the proceeds of settlement of separate litigation pending in South Carolina. The co-conspirators undertook to divert these proceeds to make fraudulent and preferential transfers of assets from Tru-Tech, Inc. to defeat the claims of the Plaintiff Class as judgment creditors.

(b) In or before March of 1989, Alan H. Finegold wrote to D. Grant Peacock, advising him to cause Tru-Tech, Inc. to dispose of certain real estate owned by Tru-Tech, Inc. in New Hampshire before the Plaintiffs could attempt to levy upon it. He advised the continuation of payment of legal fees to Tru-Tech, Inc.'s counsel in C/A No. 7:87-2243-3 in order to keep them involved in the appeal process and suggested ways to set up a new corporation in order to transfer assets out of Tru-Tech, Inc.'s name.

(c) Between March 2 and March 13, 1989, D. Grant Peacock and Alan H. Finegold met together with co-conspirator Jack Blackburn to develop and refine a strategy to defeat the claims of the Plaintiff Class.

(d) On or about March 13, 1989, Alan H. Finegold wrote to D. Grant Peacock setting forth various matters which had been settled upon pursuant to such strategy in order to defeat the rights of the Plaintiff Class, including the following:

i. It was agreed that Tru-Tech, Inc. would proceed to pay with its available cash the legal fees owed to attorneys still active on its behalf, including attorneys involved in the appeal of the judgment in C/A No. 7:87-2243-3 and the firm of Kirkpatrick & Lockhart whose purpose it was to assist in defeating the claims of the Plaintiff Class.

ii. That Tru-Tech, Inc. would refrain from the payment "of any obligations arising out of the *Thomas* litigation" so as to defeat the legitimate judgment obtained by the Plaintiff Class.

iii. Tru-Tech, Inc. would use its assets to make preferential payments to D. Grant Peacock and/or companies owned or controlled by him "in order to start running the one year period for avoidance of preferences to control persons in bankruptcy."

iv. That certain assets of Tru-Tech, Inc. including "the Uhlman note and the Brodsky note" would be transferred to certain "favored creditors", including D. Grant Peacock and/or corporations owned or controlled by him.

(e) On or about April 3, 1989, Alan H. Finegold and D. Grant Peacock combined and conspired together to transfer the Uhlman note and the proceeds from the sale of such note to "some favored creditors like Peacock, Williams & Company, Incorporated."

10. Various other acts were undertaken by these co-conspirators, the purpose and effect of which was to make

fraudulent and preferential transfers to certain preferred creditors in order to defeat the Plaintiffs' lawful claims as judgment creditors, as a result of which, Tru-Tech, Inc. was rendered insolvent and collection of Plaintiffs' judgment was prevented.

11. It was the actual and specific intention of these co-conspirators to injure the Plaintiff Class and their overt actions were specifically directed to that end so as to specifically prevent collection of Plaintiffs' judgment.

12. Pursuant to such plan and conspiracy, the co-conspirators caused and directed the appropriate officers of Tru-Tech, Inc. to make specific transfers of assets to preferred creditors and to squander and waste the assets of the corporation so as to specifically prevent collection of Plaintiffs' judgment.

13. The conveyances and transfers made pursuant to this conspiracy were fraudulent, preferential and unlawful pursuant to the public policy of the states of South Carolina, Pennsylvania and New Hampshire, including Title 27, Chapter 23, of the *South Carolina Code*, the Pennsylvania Uniform Fraudulent Conveyances Act and the New Hampshire Uniform Fraudulent Transfer Act. Specifically, these payments constituted transfers made with actual intent to defraud creditors, in violation of § 7 of the Uniform Fraudulent Conveyance Act, as preferential transfers to insiders with reasonable cause to believe that the debtor was insolvent pursuant to § 5(b) of the New Hampshire Uniform Fraudulent Transfer Act, and as conveyances to defraud and deceive creditors pursuant to § 27-23-10 and 20 of the *South Carolina Code*. In addition, these transfers and conveyances were unlawful under the applicable corporate law of the states of South Carolina, Pennsylvania and New Hampshire as payments by an insolvent corporation to officers-insider-creditors presumed to be unfair and in contravention of the officer's fiduciary duty to protect the interests of general creditors

under *Robar Development Corp. v. Minutello,* 408 A.2d 851 (Pa. Sup. Ct. 1979) and other applicable authority.

14. It was the motive and purpose of the co-conspirators to injure Plaintiffs and to hinder, delay and defraud them of their legitimate claims as judgment creditors.

15. On information and belief, the actions of D. Grant Peacock and Alan H. Finegold were intended to and did in fact enure [*sic*] to their own financial benefits because:

(a) They resulted in preferential payments to D. Grant Peacock and/or corporations owned or controlled by him.

(b) They resulted in payments for legal services and a continuation and enlargement of legal business for Alan H. Finegold and Kirkpatrick & Lockhart.

16. The co-conspirators were aware of and knowingly subscribed to the common purposes of this civil conspiracy and knowingly accepted its implications and benefits.

17. The damages to the Class proximately resulted from overt acts of Peacock, Finegold and their co-conspirators performed pursuant to such civil conspiracy.

FOR A SECOND CAUSE OF ACTION

(Piercing the Corporate Veil Under ERISA and Applicable Federal Law)

18. Paragraphs 1-17 are incorporated herein by reference.

19. Defendant Peacock is individually liable for the judgment in C/A No. 7:87-2243-3 because, as Chief Executive Officer and controlling shareholder of Tru-Tech, Inc., he assumed control over Tru-Tech, Inc. to such an extent that the company was a mere "alter ego" or

"instrumentality" of Peacock based on one or more of the following specific allegations:

(a) Tru-Tech, Inc. was inadequate [*sic*] capitalized either at incorporation or during the corporation's existence or dissolution;

(b) Tru-Tech, Inc. failed to observe corporate formalities;

(c) Tru-Tech, Inc. failed to pay dividends;

(d) Tru-Tech, Inc. was insolvent at the time payments were made to shareholders;

(e) Funds of the corporation were siphoned by the dominate [*sic*] shareholder(s);

(f) The officers or directors did not function in a responsible or independent manner;

(g) Absence of corporate records;

(h) The fact that the corporation was merely a facade for the operations of the dominate stockholder or stockholders;

(i) The extreme injustice imposed on Plaintiff's class if Defendant Peacock were allowed to milk assets from Tru-Tech, Inc. knowing of the company's liability or potential liability to Plaintiff's class.

20. As a result of such civil conspiracy and overt acts performed pursuant thereto, together with the other allegations in this Complaint, Plaintiffs suffered actual damages as follows:

(a) Inability to collect the legitimate judgment against Tru-Tech, Inc.;

(b) Related costs and legal expenses;

(c) Loss of post judgment interest on the prior judgment and prejudgment interest on the damages in this action.

WHEREFORE, Plaintiffs seek actual and punitive damages and such other relief as may be appropriate.

J. KENDALL FEW
JAMES R. GILREATH

By: /s/ J. Kendall Few
Attorneys for Plaintiffs

Greenville, South Carolina

Feb. 7, 1992

[Certificate of Service Omitted in Printing]

[Filed Mar. 3, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Civil Action No. 7-91-3843-3

JACK L. THOMAS, Individually, on Behalf of the Tru-Tech, Inc., Pension Plan, and as a Representative of a Class of Plaintiffs Similarly Situated,

Plaintiff,

vs.

D. GRANT PEACOCK and ALAN H. FINEGOLD,

Defendants.

ANSWER

Defendant D. Grant Peacock, answering the First Amended Complaint of the Plaintiff, would respectfully show unto the Court:

FOR A FIRST DEFENSE

1. Defendant lacks information sufficient to form an opinion or belief as to the truth or falsity of the allegations of Paragraph 1 of the First Amended Complaint, and therefore denies the same.

2. As to the allegations of Paragraph 2 of the First Amended Complaint, Defendant admits that Tru-Tech is a Delaware corporation. Defendant denies that Tru-Tech is doing business in the Spartanburg division.

3. As to the allegations of Paragraph 3 of the First Amended Complaint Defendant admits that he is a resident of Pennsylvania. Defendant denies he has ever held

the position or title of Chief Executive Officer of Tru-Tech, Inc. Defendant objects to the remaining allegations of Paragraph 3 of the First Amended Complaint as ambiguous and as calling for a legal conclusion.

4. Defendant admits the allegations of Paragraph 4 of the First Amended Complaint.

5. Defendant would show that the judgment against Tru-Tech, Inc. in the lawsuit referred to in Paragraph 5 of the First Amendment Complaint was in the amount of $187,628.93. Defendant is without knowledge of the specific date on which the lawsuit was filed, but would show that the Summons and Complaint in the lawsuit were mailed to defendant on or about August 24, 1987. Defendant admits the other allegations of Paragraph 5 of the First Amended Complaint.

6. Defendant denies the allegations of Paragraph 6 of the First Amendment Complaint, and specifically denies the existence of and his participation in any conspiracy and any and all allegations of fraud.

7. As to the allegations of Paragraph 7 of the First Amended Complaint, Defendant admits that Plaintiff is a former employee of Tru-Tech, Inc. and a beneficiary of the Tru-Tech, Inc. Pension Plan. Defendant denies the remaining allegations of Paragraph 7 of the First Amended Complaint.

8. Defendant denies the allegations of Paragraph 8 of the First Amended Complaint. Defendant repeats his specific denials of Paragraph 6 of this Answer.

9. As to the allegations of Paragraph 9 of the First Amended Complaint, Defendant denies the existence of any conspiracy and denies that he committed any acts pursuant to any conspiracy. Defendant further denies that he committed any unlawful acts, had or formed any illegal purpose, or had the intent of damaging the alleged rights of Plaintiff or those whom he purports to represent.

(a) Defendant admits that Tru-Tech, Inc. received proceeds of a settlement, on or about the date alleged, in separate litigation in South Carolina. Defendant is without information as to the amount of proceeds received by Tru-Tech, Inc., and so denies that the amount was $107,500. Defendant denies the remaining allegations of Paragraph 9(a) of the First Amended Complaint.

(b) Defendant admits the allegations of the first sentence of paragraph 9(b) of the First Amended Complaint. Defendant also admits that Alan H. Finegold advised that Tru-Tech, Inc. continue to pay the legal fees of counsel in C.A. No. 7:87-2243-3. Defendant admits that Mr. Finegold suggested the alternative of formation of a corporation to purchase certain assets from Tru-Tech, Inc. for full value; however, this suggestion was never carried out.

(c) As to the allegations of Paragraph 9(c) of the First Amended Complaint, Defendant admits that he met with Alan Finegold, and that the two of them spoke by telephone with Jack Blackburn, during the period alleged. Defendant denies that there was a conspiracy and denies that Jack Blackburn was a co-conspirator. Defendant denies that he was in any way involved with or aware of any strategy to defeat the alleged claims of Plaintiff or those whom he purports to represent.

(d) As to the allegations of Paragraph 9(d) of the First Amended Complaint, Defendant admits that Alan Finegold wrote to Defendant on or about March 13, 1989. Defendant reiterates his denial of any purpose of defeating the alleged claims of Plaintiff or those whom he purports to represent.

(i) Defendant admits that Mr. Finegold's letter recited that Tru-Tech would continue to pay attorneys still active on its behalf. Defendant denies all other allegations of Paragraph 9(d)(i) of the First Amended Complaint.

(ii) Defendant admits that Mr. Finegold's letter recited that Tru-Tech would not at that time make payments on the judgment in C.A. No. 7:87-2243-3, which was at that time pending appeal.

(iii) Defendant admits that Mr. Finegold's letter recited that Tru-Tech would pay bona fide debts owed to Defendant and to Peacock Williams & Co. Defendant denies the remaining allegations of Paragraph 9(d)(iii) of the First Amended Complaint.

(iv) Defendant denies the allegations of Paragraph 9(d)(iv) of the First Amended Complaint.

(e) As to the allegations of Paragraph 9(e) of the First Amended Complaint, Defendant admits that the so-called "Brodsky Note" was transferred by Tru-Tech for valid consideration, and admits that Tru-Tech sold a note made by L. Parker Uhlman and Carolyn Anne Uhlman for cash. Defendant denies the remaining allegations of Paragraph 9(e) of the First Amended Complaint.

10.-17. Defendant denies the allegations of Paragraphs 10-17 of the First Amended Complaint.

18. Defendant incorporates herein his responses as set forth in Paragraphs 1-17 above.

19.-20. Defendant denies the allegations of Paragraphs 19-20 of the First Amended Complaint. Defendant denies all allegations not expressly admitted hereinabove. Defendant denies that Plaintiff is entitled to any relief.

FOR A SECOND DEFENSE
(ABSENCE OF PERSONAL JURISDICTION)

21. Defendant reiterates the above allegations not inconsistent with this Second Defense.

22. Defendant lacks, and Plaintiff has not alleged, minimum contacts with the State of South Carolina sufficient to establish personal jurisdiction over Defendant

under the United States Constitution or the laws of the State of South Carolina.

23. In consequence of the foregoing, this Court should dismiss this action as to Defendant.

FOR A THIRD DEFENSE (IMPROPER VENUE AND FORUM NON CONVENIENS)

24. Defendant reiterates the above allegations not inconsistent with this Third Defense.

25. Neither Defendant resides in this judicial district; both reside in the Western District of Pennsylvania.

26. Neither Defendants nor Tru-Tech took actions or made omissions in this district during the period relevant to this claim, and no property that is subject to this claim is situated in this district.

27. Neither Defendant is subject to personal jurisdiction in this district.

28. No evidence concerning this claim is present in this district.

29. In consequence of the foregoing, venue is improper in this action and this forum is an inconvenient one. Accordingly, this Court should dismiss this action pursuant to 28 U.S.C. § 1406(a) or, in the alternative, transfer it pursuant to 28 U.S.C. § 1406(a) or 28 U.S.C. § 1404(a).

FOR A FOURTH DEFENSE (FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED)

30. Defendant reiterates the above allegations not inconsistent with this Fourth Defense.

31. Neither Count of the First Amended Complaint states a claim upon which relief can be granted.

32. In consequence of the foregoing, this Court should dismiss this action.

FOR A FIFTH DEFENSE (FAILURE TO JOIN INDISPENSABLE PARTIES)

33. Defendant reiterates the above allegations not inconsistent with this Fifth Defense.

34. There are other persons who claim an interest relating to the subject matter of this action, whose absence may impede or impair their own interests and leave Defendant subject to substantial risk of inconsistent obligations.

35. Plaintiff has not made such persons parties to this lawsuit.

36. In consequence of the foregoing, this Court should dismiss this action.

FOR A SIXTH DEFENSE (STATUTE OF LIMITATIONS AND LACHES)

37. Defendant reiterates the above allegations not inconsistent with this Sixth Defense.

38. This action was brought after expiration of the applicable statute of limitations.

39. Plaintiff has delayed unreasonably and inequitably in the prosecution of this lawsuit, despite the opportunity to proceed diligently.

40. Defendant has been prejudiced by this neglect.

41. In consequence of the foregoing, this Court should dismiss this action.

FOR A SEVENTH DEFENSE (WAIVER)

42. Defendant reiterates the above allegations not inconsistent with this Sixth Defense.

43. Plaintiff's Second Cause of Action seeks to "pierce the corporate veil" of Tru-Tech, Inc. and hold Defendant

Grant Peacock liable for the benefit of the plaintiff class in C.A. No. 7:87-2243-3.

44. Besides not being a proper claim for which relief may be granted and not including Tru-Tech, Inc. as a party, as noted hereinbefore, this "cause of action" is defective because it should have been raised, if at all, in C.A. No. 7:87-2243-3. By failing to do so, Plaintiff has waived his right to the relief sought under the second count of his complaint.

45. In consequence of the foregoing, this Court should dismiss Plaintiff's Second Cause of Action.

WHEREFORE, Defendant prays that the Complaint be dismissed with costs.

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No. 94-1438

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

D. GRANT PEACOCK,

Petitioner,

v.

JACK L. THOMAS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

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QUESTIONS PRESENTED

1. Whether a court may create a federal common law ERISA veil-piercing remedy, to impose a judgment entered pursuant to ERISA in a prior lawsuit on a person not made liable by that prior judgment.

2. Whether a federal court may automatically assert "ancillary" jurisdiction over a separate lawsuit, involving separate facts and a new legal theory, filed for the purpose of imposing a prior federal judgment upon a party other than the judgment debtor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1453

D. GRANT PEACOCK,
Petitioner,

v.

JACK L. THOMAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a, is reported at 39 F.3d 493. The opinions of the district court are unreported. Pet. App. 30a, 54a.

JURISDICTION

The court of appeals entered its judgment on November 4, 1994. Petitioner timely sought rehearing by the Fourth Circuit, and that request was denied on December 2, 1994. The petition for a writ of certiorari was filed on March 1, 1995, and was granted on May 22, 1995. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 502(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a), enumerates the private causes of action available under ERISA. Its text is set forth in the Appendix, *infra*, at 1a.

Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2), ERISA's nationwide service of process provision, provides:

> Where an action under this subchapter is brought in a district court of the United States, . . . process may be served in any other district where a defendant resides or may be found.

Article III, Section 2 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT

A. Overview.

Respondent Jack Thomas sued Petitioner Grant Peacock for breach of fiduciary duty under ERISA. Petitioner was exonerated, but a judgment was entered against his co-defendant, Tru-Tech, Inc. ("Tru-Tech"). Unable to collect the judgment from Tru-Tech, respondent then filed this second, independent lawsuit against petitioner to

"Pierc[e] the Corporate Veil Under ERISA and Applicable Federal Law." J.A. 49 (Amended Complaint). In this second suit, respondent sought to impose personal liability on petitioner for the judgment rendered solely against Tru-Tech in the earlier lawsuit, on the basis of acts that took place after entry of that judgment.

At issue in this case are (a) the existence of the federal common law veil-piercing remedy said by the courts below to arise out of ERISA; and (b) the power of a federal court to entertain a separate lawsuit such as this, where there is no independent basis of federal jurisdiction.

This action was begun with a new complaint, a new civil action number, and new service of process; it involved new parties, new factual allegations and new theories of recovery. Its sole link to the prior case and to the federal courts is that it seeks to identify strangers to the prior judgment who may have a responsibility to satisfy that judgment on some legal theory independent of the terms of the judgment itself.

Petitioner argued below that ERISA does not provide for a cause of action to "pierce the corporate veil" in order to collect a judgment entered in a prior lawsuit brought pursuant to ERISA: Respondent's claim did not refer in any way to an ERISA plan or invoke any of ERISA's remedial provisions; its sole connection to ERISA was that it sought to collect a judgment obtained in a lawsuit that invoked ERISA. The district court disagreed, holding that respondent had stated a viable ERISA claim that permitted recovery against petitioner.

The Fourth Circuit affirmed, but with a twist to the analysis. The court of appeals did not simply hold, as did the district court, that respondent had stated a claim under ERISA that would confer federal question jurisdiction. The court instead based federal court jurisdiction here solely on the existence of federal jurisdiction in the prior

action. Despite the absence of any common nucleus of operative fact between the two lawsuits, that court concluded that a federal court has "ancillary jurisdiction" over a separate lawsuit brought for the purpose of imposing a prior federal court judgment on a person other than the judgment debtor from the prior suit.

Notwithstanding its unwillingness to conclude, as respondent urged, that the claim here stated an ERISA cause of action, the Fourth Circuit went on to hold, without reference to any statutory source, that ERISA provides the rule of decision where an attempt is made to pierce the corporate veil to impose an ERISA judgment on a shareholder of a judgment debtor: "we believe that ERISA preempts any state law of veil-piercing." Pet. App. 20a. The court concluded that ERISA does not attach great weight to corporate form, and that a "liberal veil-piercing standard" is appropriate in ERISA actions. *Id.* at 23a.

B. Preliminary Matters: The History of Tru-Tech, Inc. and The Prior Lawsuit.

An understanding of this case requires brief discussion of Tru-Tech, and the judgment against it that respondent seeks to impose on petitioner.

1. Tru-Tech, Inc.

Tru-Tech was organized in 1981 by Bill W. Wilcock, who served as its first President and C.E.O. Tru-Tech had substantial initial capital, obtained from a group of investors that included petitioner. Pet. App. 4a-5a. In the initial stock placement, in 1981, petitioner and Grant Peacock & Co. (a corporation wholly owned by petitioner)[1] together purchased 22% of the voting stock of Tru-Tech. (Trial Transcript reprinted in Fourth Circuit Joint Appendix ("C.A.4 App.") at 145-46.) In addition, petitioner and other shareholders shortly thereafter lent about $350,000 to Tru-Tech, with petitioner putting up $179,760. C.A.4 App. 147.

[1] Grant Peacock & Co. was known for a time as "Peacock, Williams & Co." and is referred to in the opinion below as "PW & C."

Tru-Tech was a legitimate, fully capitalized corporation, whose affairs were conducted with careful regard for corporate formalities.[2] Nevertheless, largely because of external factors identified by the district court, Pet. App. 32a, Tru-Tech's business was a failure. By September 1983, Tru-Tech had lost over $2 million. C.A.4 App. 150.

By mid-1985, Tru-Tech's primary source of revenue was the sale of its own assets. The person in charge of that liquidation was John H. Blackburn, who had succeeded Mr. Wilcock as the President of Tru-Tech. In 1986, Mr. Blackburn was removed from Tru-Tech's payroll (because Tru-Tech had no means of paying him) and placed on that of Grant Peacock & Co. This was done to assure Mr. Blackburn that he would be paid for his services, and thus to ensure that Mr. Blackburn could continue to serve Tru-Tech. Grant Peacock & Co. billed Tru-Tech $10,000 per month for the costs of this arrangement, amounts that Tru-Tech did not pay. Pet. App. 33a. By thus underwriting the efforts toward an orderly winding up of Tru-Tech's affairs, Grant Peacock & Co. incurred costs, including the unpaid bill for Mr. Blackburn's services, of approximately $300,000. C.A.4 App. 160, 203.

2. The Prior Lawsuit.

At issue in *Thomas v. Tru-Tech, Inc.* ("*Tru-Tech*") was Tru-Tech's pension plan for its salaried employees (the "Plan"). In 1981, Tru-Tech's Board of Directors approved creation of the Plan, "subject to the condition

[2] Tru-Tech's Minute Books, which were made defendant's exhibits at the trial of the instant case, show that the Board of Directors was actively involved in the governance of Tru-Tech, and that proper formalities were followed into 1990—long after Tru-Tech had gone into liquidation.

precedent that the Plan shall be approved and qualified by the Internal Revenue Service." J.A. 34.

In fact, the IRS informed Tru-Tech that the Plan in its original form was not acceptable because its ten-year "cliff" vesting schedule was not favorable enough to employees. In response to this notification, and without Board approval or knowledge, Tru-Tech's President, Mr. Wilcock, submitted to the IRS an amendment to the Plan designed to meet the IRS's concerns. J.A. 34.

After Mr. Wilcock's termination, Tru-Tech's Board was informed of the IRS's adverse determination. Unwilling to depart from the cliff vesting schedule, and unaware of the amendment submitted by Mr. Wilcock, the Board resolved in April of 1984 to terminate the Plan and replace it with a profit sharing plan. Subsequently, when Tru-Tech's new Executive Vice President learned of the amendment, he wrote to the IRS, stating that the amendment had not been approved by Tru-Tech's Board and requesting an adverse determination from the IRS. The IRS issued its adverse determination in January of 1985, and the Plan was terminated and its assets refunded to Tru-Tech. J.A. 35.

Tru-Tech was filed in August of 1987 as a class action on behalf of the former salaried employees of Tru-Tech who claimed that the Plan had been improperly terminated and that they were entitled to benefits under the Plan. The class asserted numerous causes of action against a number of defendants, including breach of fiduciary duty under ERISA, against Tru-Tech, petitioner, and Grant Peacock & Co.

The *Tru-Tech* district court issued an order dated November 28, 1988, ruling that the plaintiffs were entitled to benefits, and further holding that Tru-Tech, as a fiduciary of the Pension Plan, was liable for those benefits. Exhibit A to the district court's order set forth a list of the class members and the amounts of their individual

recoveries, which totaled (after opt-outs and a set-off for a settlement by one party) $187,628.93.

The court also expressly held that petitioner was not a fiduciary of the Pension Plan, and that he had no liability. The court found as follows:

> At most, Grant Peacock, as chairman of the board of Tru-Tech, was involved along with the other members of the board of directors in the business decisions relating to the formation and design of the salaried pension plan. These were not fiduciary decisions, but were business decisions relating to the design features of the pension plan. Therefore, I make the following finding of fact:
>
> Neither D. Grant Peacock & Co. [*sic*] nor D. Grant Peacock exercised discretionary authority and control over the management and administration of the plan and the disposition of its assets.

J.A. 24.

The Fourth Circuit affirmed the district court in all respects. This ruling left intact a judgment in favor of the plaintiffs' class against Tru-Tech and the decision that petitioner was not a fiduciary subject to ERISA liability. J.A. 32-42.

In affirming, the court of appeals specifically reinforced the district court's rejection of respondent's attempt to impose liability directly on petitioner:

> [T]he district court held that Peacock acted solely in his capacity as Chairman of the Board of Tru-Tech, not as a fiduciary of the Plan. Indeed, the record reveals that Tru-Tech's Board of Directors resolved in a meeting on October 11, 1984, to retain the ten-year cliff vesting schedule. Conceding this, *Thomas insists that Peacock, as the principal investor, dominated the Board and had de facto power to make these decisions concerning the Plan. But this influence has scant evidentiary support and does not*

contradict the finding that these decisions were made by the Board, not Peacock acting unilaterally.

J.A. 38-39 (emphasis added).

C. The Instant Case.

Unable to collect the judgment against the insolvent Tru-Tech, respondent again sued petitioner in federal court. Without pointing to any particular ERISA cause of action, respondent's amended complaint, filed in 1992, invoked federal authority by relying on "ERISA and Applicable Federal Law," J.A. 49, and respondent served petitioner under ERISA's provision for nationwide service of process, Pet. App. 62a-65a.

1. *Before the District Court.*

In this action, respondent contended that petitioner should be required to pay the judgment against Tru-Tech because, he alleged, petitioner had caused assets of Tru-Tech to be diverted for his own benefit. Toward this end, respondent relied principally on the assignment of certain notes held by Tru-Tech to entities associated with petitioner. Each of the assignments relied on by the district court to pierce Tru-Tech's veil was completely unrelated, both in time and in substance, to the ERISA violation that had been reduced to judgment in *Tru-Tech*, *i.e.*, the company's failure to maintain the Plan. Indeed, each of the assignments occurred after the district court's judgment in *Tru-Tech*. C.A. 4 App. 166-68, 432.[3]

[3] Petitioner showed below that each of the transfers at issue was supported by valid consideration; cash was paid for one note, while the remaining receivables, with a combined face value of less than $60,000, were assigned to Grant Peacock & Co. in partial satisfaction of the debt owed by Tru-Tech to Grant Peacock & Co. for Mr. Blackburn's liquidation services. C.A. 4 App. 168, 191; J.A. 41a. Both lower courts brushed past the question of consideration by noting that Grant Peacock & Co. had for internal accounting purposes written off those amounts owed it by Tru-Tech; this of course does not mean that the money was no longer owed. The lower courts also failed to deal with uncontradicted evidence that the transferred notes were either valueless or worth substantially less than their face amounts. C.A. 4 App. 155-58, 166. It is a small irony of this case that relatively large liability was imposed on petitioner without any reference to the size of any benefit—improper or otherwise—that he received.

Petitioner's primary legal argument in the court below was that ERISA does not provide for a cause of action for "piercing the corporate veil" to impose on a third party a judgment entered in a prior ERISA action. Noting that respondent's Amended Complaint neither invoked any specific remedial provision of ERISA nor made any reference to any element of an ERISA plan, petitioner contended that respondent, as a judgment debtor, was entitled only to available state law remedies to satisfy the judgment.

The district court disagreed, holding that respondent stated an ERISA cause of action.[4] The district court also looked to ERISA for its substantive rule of decision. Relying on the "broad, remedial scope" of ERISA, Pet. App. 50a, the district court concluded that the "congressional intent of ERISA is to hold employers responsible for pension benefits, so that when the corporate form poses a bar to liability, concerns for corporate separateness are secondary to the mandate of ERISA." Pet. App. 44a-45a. Under this relaxed federal common law standard, the court concluded that Tru-Tech's veil could be pierced and the *Tru-Tech* liability imposed on petitioner. Pet. App. 52a-53a.

[4] An important implication of this ruling was the district court's assertion of personal jurisdiction over petitioner; in the face of uncontradicted affidavits showing petitioner had no constitutionally cognizable contacts with South Carolina, the district court nevertheless asserted personal jurisdiction over petitioner on the basis of ERISA's provision for nationwide service of process. Pet. App. 62a-65a.

2. *On Appeal.*

The Fourth Circuit approached the case on a fundamentally different tack from the district court, separating the question of federal subject matter jurisdiction from the existence of a federal common law remedy under ERISA. Accordingly, the court of appeals held that federal subject matter jurisdiction exists even without the existence of a cause of action arising out of ERISA.

The court first observed that there was no basis for federal court jurisdiction "other than the fact that the suit seeks to enforce a judgment obtained pursuant to ERISA." Pet. App. 11a n.6. The court then began its analysis of subject matter jurisdiction, first characterizing the nature of an action to pierce the corporate veil: It "is not simply an attempt to collect a preexisting liability against an entity already found liable under the relevant substantive law; it is, rather, an attempt to impose such a preexisting liability upon an entity *not otherwise liable*." Pet. App. 12a. Thus, the doctrine of piercing the corporate veil is "a substantive rule of liability." *Id.* It "seeks to identify those parties against whom the judgment can be satisfied." *Id.* at 13a. Finally, because "identification of those parties who are liable is necessarily antecedent to procedural enforcement of the judgment against those parties," the court of appeals concluded that it had "ancillary" jurisdiction over "the instant attempt to pierce the corporate veil." *Id.*

The Fourth Circuit acknowledged that its holding appeared to be at odds with *H.C. Cook Co. v. Beecher*, 217 U.S. 497 (1910), which "does make clear that the mere fact that a 'former judgment [provides] the foundation of [a subsequent] case,' is insufficient, alone, to establish that the subsequent case falls within the federal court's ancillary jurisdiction." Pet. App. 15a (citation omitted; quoting *Beecher*, 217 U.S. at 499). The court held, however, that the actual test for the propriety of an assertion of ancillary jurisdiction is whether the subsequent action is "truly independent" of the prior action. The court concluded:

> Without defining the precise contours of when a subsequent litigation is "independent" of a former litigation and judgment, we believe that [respondent] Thomas' attempt to pierce the corporate veil is not "independent" of the initial litigation herein. As noted above, an attempt to pierce the corporate veil is necessarily subsidiary to some primary cause of action. *That Thomas opted to file a separate action to pierce Tru-Tech's corporate veil is irrelevant*: the court's subject matter jurisdiction does not turn on whether Thomas pursued the procedurally proper route. . . . [*T*]*his is, at bottom, a proceeding the goal of which is to collect the judgment earlier obtained by the plaintiff class. There is, in short, simply no practical reason to treat this litigation as separate from the initial litigation.*

Pet. App. 16a-18a (citations and footnotes omitted; emphasis added).[5]

The court then proceeded to fashion an ERISA common law remedy for piercing the corporate veil—this despite having declined to base subject matter jurisdiction directly on the assertion of a cognizable ERISA cause of action. The court concluded that "ERISA preempts any state law of veil-piercing." Pet. App. 20a. It then joined the district court in "adopt[ing a] liberal veil-piercing standard . . . for use in ERISA actions." *Id.* at 23a. The court of appeals thus affirmed the imposition of Tru-Tech's liability on petitioner, stating that ERISA does not "attach great weight to corporate form." *Id.* at 22a.

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[5] The Fourth Circuit did not expressly address petitioner's argument that there could be no personal jurisdiction over him if there was no ERISA cause of action. *See supra* note 4. This issue presumably was one of the "remaining arguments" dismissed by the court as being "without merit." Pet. App. 24a.

SUMMARY OF ARGUMENT

I. By federalizing the law of veil piercing in order to enhance ERISA plaintiffs' ability to find a solvent party to pay an ERISA judgment, the Fourth Circuit has done what the express teachings of this Court and the clear intent of Congress forbid. Given ERISA's comprehensive nature, courts should *not*, as the court of appeals did here, "infer causes of action in the ERISA context." *Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2071 (1993).

Nor is there any need for a federal common law of ERISA veil piercing. ERISA itself contains a mechanism for reaching beyond the corporate veil. Its definition of "fiduciary" imposes liability without regard to the corporate form. Petitioner was here expressly adjudged not to be a fiduciary; if respondent failed in his attempt to reach beyond the corporate veil to petitioner under the express terms of ERISA, he should not be allowed to do so under a judicial expansion of the statute.

Particularly pertinent here is *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 833 (1988), in which the Court explained that "ERISA does not provide an enforcement mechanism for collecting judgments won" in ERISA cases. If ERISA does not provide for the simple enforcement of ERISA judgments, it surely cannot be held to contain implicitly an even more complex mechanism for the imposition of those judgments on a third party.

The conclusion from *Mackey* that state law provides the forum and the remedy for disputes such as this one is reinforced by this Court's recent pronouncements on the scope of ERISA's preemption provision. Contrary to the Fourth Circuit's holding, ERISA does not preempt the state law of veil piercing. The claim here—that petitioner improperly transferred assets from a corporation previously held liable under ERISA—has no "connection with or reference to" an ERISA plan. *Metropolitan Life*

Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985). Nor would application of state law rules to such a dispute interfere with the goal of a "nationally uniform administration of employee benefit plans." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1678 (1995).

State courts are more than competent to adjudicate this quintessentially state-law matter of whether a corporate veil should be disregarded. While it may be that the appropriate state law remedy would be the avoidance of preferential transfers, rather than veil piercing, since petitioner was not Tru-Tech's alter ego at the time of the ERISA wrong, the fact remains that respondent would have had available state law remedies. There is no need to federalize this realm of the law.

Accordingly, it was error to look to ERISA for the substantive rule of decision, and ERISA cannot supply subject matter jurisdiction in this case.

II. These deficiencies are not remedied by the invocation of the federal courts' "ancillary jurisdiction." The action here is "more than just a continuation or renewal of the [prior] suit, and hence requires its own basis for jurisdiction." *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1673, 1676 (1994).

Indeed, this Court has previously held that "an attempt to make [new] defendants answerable for the judgment already obtained" is not "ancillary to the judgment in the former suit." *H.C. Cook Co. v. Beecher*, 217 U.S. at 498-99. *Beecher* controls here and requires reversal.

Beecher's rule is plainly correct. Because the only link between this case and *Tru-Tech* is that respondent's purpose is to obtain payment on the *Tru-Tech* judgment from *someone*, and because this effort is based on post-judgment activities, there is no "common nucleus of operative fact" that would make the two actions part of the same constitutional case. *Owen Equip. & Erec. Co. v. Kroger*, 437 U.S. 365, 371 (1978).

Nor can an effort to find additional parties to pay a judgment that the judgment debtor cannot satisfy be considered necessary "to enable a court to function successfully." *Kokkonen*, 114 S. Ct. at 1676. A search for deeper pockets may be desirable for the *plaintiff* who holds the judgment, but it cannot be called essential to the functioning of the court. Again, the state courts are perfectly suited to this effort. Whatever the extent to which necessity can expand a federal court's Article III jurisdiction, it will not go this far.

The Fourth Circuit's use of ancillary jurisdiction invokes a federal court's inherent power to turn into a federal question a matter Congress chose not to include within ERISA. This circumvents congressional will, and both Article III and prudential limits on jurisdiction. The decision would open the gates to the full panoply of suits over the responsibility of third parties—under a variety of theories—for previously rendered federal court judgments. Neither necessity nor convenience counsels in favor of such a rule; Article III forbids it.

ARGUMENT

I. IT WAS ERROR TO FEDERALIZE THE LAW OF VEIL PIERCING TO IMPOSE LIABILITY FOR PRIOR ERISA JUDGMENTS ON PARTIES NOT MADE LIABLE BY THE TERMS OF ERISA ITSELF.

The decision below erroneonsly expands ERISA to include a federal cause of action to pierce the corporate veil whenever the holder of a judgment entered under ERISA is unable to collect from the ERISA judgment debtor. The court held that "ERISA preempts any state law of veil-piercing," and consequently that the standard for piercing the corporate veil is to be determined by reference to federal common law.[6] ERISA was invoked

[6] Perhaps concerned over its expansive use of ERISA, the Fourth Circuit relied on the doctrine of "ancillary jurisdiction"

below despite the absence from this case of reliance on any remedial provision of ERISA, mention of any provision of any ERISA plan, or even any allegation of an ERISA breach by petitioner. Indeed, petitioner had previously been exonerated on the very wrongs that formed the basis for the ERISA judgment. The decision below is at odds with this Court's teachings regarding the availability of non-statutory remedies under ERISA, ERISA preemption, and the proper judicial approach to implied rights of action and the creation of federal common law generally. ERISA provides neither a cause of action nor a rule of decision in this case.

A. Judicial Creation of a Federal Common Law Rule of ERISA Veil Piercing Is Inconsistent With This Court's Opinions and the Text of ERISA.

1. *"Congress Did Not Intend to Authorize Other Remedies That it Simply Forgot to Incorporate Expressly" into ERISA.*

In *Mertens v. Hewett Associates*, 113 S. Ct. 2063, this Court held that ERISA does not authorize suits for monetary relief by plan participants against a *non*-fiduciary, even one who "knowingly participates" in a breach by a fiduciary. Observing that the only provision of ERISA that could be read to allow suit against nonfiduciaries provides for "equitable relief" only, the Court declined to go beyond the express provisions of ERISA to allow monetary recovery, instead of equitable relief, against a nonfiduciary.

After noting that ERISA is a "comprehensive and reticulated statute," 113 S. Ct. at 2066 (internal quota-

for its subject matter jurisdiction. Given the broad grant of jurisdiction to the federal courts in § 502(e) of ERISA, 29 U.S.C. § 1132(e), however, this reliance seems unnecessary. It would appear that if the court of appeals had been correct that ERISA preempts the state law of veil piercing and provides the substantive rule of decision, subject matter jurisdiction would be provided by ERISA.

tions omitted), this Court stated its "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." 113 S. Ct. at 2067 (internal quotations omitted). In closing, the Court rejected an invitation to "give a strained interpretation to [ERISA] in order to achieve the [claimed] 'purpose of ERISA to protect plan participants and beneficiaries.'" 113 S. Ct. at 2071. The Court stated that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text," especially with respect to "ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Id.; see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) ("The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA."); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) ("carefully integrated" enforcement scheme of ERISA is "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly").[7] As this Court observed in rejecting the similar

[7] This principle is not limited to construction of ERISA. This Court has repeatedly held that it will not use federal common law to supplement the remedies chosen by Congress. *See, e.g., Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-87 (1952); *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 97-98 (1981); *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 644-45 (1981). The Court has also noted in other contexts that it proves too much to argue that a judicial remedy must be interposed to vindicate the purpose of a statute: "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement

"more money" argument that federal common law must be created to serve the federal policy of avoiding depletion of the deposit insurance fund, "there is no federal policy that the fund should always win." *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2055 (1994).

The courts below did precisely what the Court in *Mertens* said they should not. They found a remedy in ERISA for piercing the corporate veil where Congress supplied none. Indeed, the form of this superadded remedy—an award of money damages against a nonfiduciary—is identical to the remedy rejected by this Court in *Mertens*. 113 S. Ct. at 2068 ("Money damages are, of course, the classic form of *legal* relief.").[8] Under *Mertens*, the courts are not free to attach additional remedies in general, nor this remedy in particular, to ERISA.[9]

of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam); *see Landgraf v. U.S.I. Film Prods.*, 114 S. Ct. 1483, 1508 (1994) ("[s]tatutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal"); *Central Bank, N.A. v. First Interstate Bank, N.A.*, 114 S. Ct. 1439, 1454 (1994) ("purpose" arguments are insufficient to support expansive interpretation of federal securities laws).

[8] Even if this action could be viewed as seeking equitable relief, it could not be maintained under ERISA. Here, as was the case in *Mertens*, there is no allegation of any violation of ERISA or an ERISA plan that could serve as a basis for invoking ERISA § 502(a)(3), 29 U.S.C. § 1332(a)(3). ERISA "does not, after all, authorize 'appropriate equitable relief' *at large*." *Mertens*, 113 S. Ct. at 2067. It follows from this logic that *Mertens* forbids any sort of relief—monetary or equitable—against nonfiduciaries for engaging in conduct not prohibited by ERISA. *See Reich v. Rowe*, 20 F.3d 25, 30-31 (1st Cir. 1994); *Reich v. Compton*, 1995 WL 329911 at *11-*12 (3d Cir. 1995).

[9] To be sure, ERISA has its "roots in the common law of trusts," *Mertens*, 113 S. Ct. at 2068, and this Court has recognized that

2. *ERISA Already Contains a Standard for Reaching Beyond the Corporation in its Definition of "Fiduciary." A Judicially Created Veil-Piercing Standard Should Not Be Superimposed on the Statutory Standard.*

At the core of *Mertens* is the principle that ERISA is not a work in progress, and judicial additions are not lightly to be made. This principle has particular force where, as here, the statute deals directly with the matter at issue.

ERISA makes provision for reaching beyond the corporation itself, by imposing liability on an individual as a fiduciary whenever he or she "exercises any discretionary authority or discretionary control" with respect to the plan. 29 U.S.C. § 1002(21)(A). As this Court has noted, the definition is couched in functional terms, and it "expand[s] the universe of persons subject to fiduciary duties" beyond the common law boundaries. *Mertens*, 113 S. Ct. at 2071. The corporate form provides no defense to liability as a fiduciary.[10] If a corporate officer or shareholder "exercises discretionary authority or discretionary control" over a plan, then he or she is a fiduciary as that term is

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this common law heritage assists in an understanding of ERISA. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989). The corporate alter ego doctrine, however, is not a part of the common law of trusts, and reliance on the common law of trusts as an aid in interpreting the express provisions of ERISA cannot be stretched to support judicial creation of an extrastatutory veil-piercing remedy.

[10] *See Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1459-61 (9th Cir. 1995) (officer of corporate "named fiduciary" can individually be a fiduciary if statute's "functional test" is met); *Dardaganis v. Grace Capital Inc.*, 889 F.2d 1237, 1242-43 (2d Cir. 1989) (President and CEO of corporate fiduciary has personal liability under ERISA where he "exercised complete discretion over the disposition of the Fund assets," and hence was himself a fiduciary; citing 29 C.F.R. § 2510.3-21); *see also Confer v. Custom Eng'g Co.*, 952 F.2d 34, 40 (3d Cir. 1991) (Seitz, J., concurring) (corporate officer individually can be a fiduciary if officer performed "functions enumerated in the statute").

defined by statute, and is subject to the remedies outlined in ERISA.[11] Absent such authority or control—and it must be emphasized that petitioner was adjudged in *Tru-Tech* not to have such authority—the person is not a fiduciary and not liable for fiduciary breach under ERISA.

ERISA's definition of "fiduciary" specifies when one sheltering behind the corporate veil may be forced under the auspices of ERISA to make payments with respect to an ERISA plan.[12] In this sense—that is, whenever sufficient discretionary authority is exercised to render an individual a "fiduciary" under ERISA—there may be instances in which ERISA can be said not to "attach great weight to corporate form." Pet. App. 22a. But the weight that ERISA attaches must be determined by reading ERISA itself; the statutorily granted power to ignore the corporate form in certain circumstances provides no basis for creating a common law rule that the corporate form will be ignored whenever doing so yields a result that the court deems desirable. "[O]nce Congress addresses a subject, . . . the task of the federal courts is to interpret and apply statutory law, not to create common law." *Northwest Airlines*, 451 U.S. at 95 n.34; accord *Mertens*, 113 S. Ct. at 2070 (the "authority of courts to develop a 'fed-

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[11] ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), requires an employee benefit plan to "provide for one or more named fiduciaries." Thus, Congress also specified that there would be at least one accountable entity associated with each plan. This provision rules out a broader judicial search such as the one below, conducted on the basis of the "broad remedial purposes of ERISA," for *some* party to satisfy every ERISA judgment.

[12] *Cf. Reich v. Compton*, 1995 WL 329911 at *6 (declining to pierce the veil of an ERISA party in interest to impose liability on alleged alter ego; "Congress could have easily provided in [ERISA] that an 'alter ego' of a party in interest is also a party in interest, but Congress did not do so").

eral common law' under ERISA is not the authority to revise the text of the statute" (citation omitted)); *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981).

B. State Law Applies to an Action Such as This One. State Courts Provide an Appropriate and Adequate Forum.

1. This Court's Decision in* Mackey, *Establishing That ERISA Does Not Provide a Mechanism for Enforcing ERISA Judgments, Makes it Clear That State Law Applies Here.

In *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 833 (1988), this Court explained that "ERISA does not provide an enforcement mechanism for collecting judgments won" in civil enforcement actions under ERISA's 29 U.S.C. § 1132. "Consequently," the Court concluded, "state-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA[.]" 486 U.S. at 834. *Mackey* remits a plaintiff seeking to collect an ERISA judgment to state law remedies.[13]

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[13] To be sure, the facts of *Mackey* are different from those of this case, but the holding of *Mackey* that ERISA does not provide an enforcement mechanism is clear. *Mackey* involved two issues, both of which arose from an attempt by a Georgia collection agency to garnish welfare plan benefits to collect money judgments. In the first portion of its opinion, the Court struck down a Georgia statute that specifically exempted ERISA plans from "the process of garnishment," on the grounds that the law made "reference to" an ERISA plan and thus was preempted by ERISA. 486 U.S. at 828-30.

The second portion of the opinion went on to consider whether the entire Georgia garnishment procedure was preempted by ERISA. In this context, the Court concluded that ERISA does not provide its own mechanism for the enforcement of judgments: hence, the Court held that state law mechanisms must be used and that the garnishment statute was not preempted. 486 U.S. at 830-40. Plainly, if ERISA did contain a general enforcement mechanism for judgments relating to ERISA plans, akin to what respondent sought to initiate in the instant case, the Court would have reached a different result.

This case goes beyond a simple enforcement action. It introduced a new theory of liability, and required a new trial on new facts, to impose the *Tru-Tech* judgment on one not a party to the judgment. As the court below stated in discussing *Mackey*, it "would be error . . . to characterize the doctrine of piercing the corporate veil as a mere judgment enforcement mechanism." Pet. App. 20a. We submit, however, that the Fourth Circuit missed the implication of its own observation. If, under *Mackey*, ERISA does not provide a mechanism even for the simple enforcement of ERISA judgments, it follows *a fortiori* that ERISA cannot be found to contain implicitly a broader mechanism for proceedings that invoke new legal theories and new facts in order to *expand and alter*, and not just enforce, ERISA judgments.

2. General Principles of ERISA Preemption Established by This Court Show That This Case Does Not "Relate to" an ERISA Plan.

ERISA contains an express preemption provision, Section 514(a), 29 U.S.C. § 1144(a), which sweeps from the field "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. The breadth of this preemption clause provides a direct measure of Congress' intent to substitute ERISA causes of action for state law; if an area is not preempted by ERISA, it follows that the state law cause of action and rule of decision remain unaffected. *See Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted"); *Cf. Mackey*, 486 U.S. at 834 (because ERISA does not provide for collection of judgments, it follows that state-law collection methods are not pre-empted).

Without any analysis of the cases defining the scope of ERISA preemption, the Fourth Circuit held that, "[b]ecause a rule of veil-piercing determines *who* is liable for breaches of ERISA fiduciary duties, we believe that ERISA preempts any state law of veil-piercing." Pet. App. 20a. To the contrary, it is plain under this Court's cases that ERISA does not preempt a state law action to pierce the veil of a corporation that has previously had an ERISA judgment entered against it. ERISA's failure to preempt this area buttresses the conclusion that there is no justification for creating an ERISA cause of action.

This Court has observed on several occasions that the phrase "relate to" in Section 514(a) is given "its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Metropolitan Life*, 471 U.S. at 739 (quoting *Shaw v. Delta Air Lines*, 463 U.S. 85, 97 (1983)).

Even applying "common sense" at its broadest, however, the state law of veil piercing as it would apply in this case cannot be said to "relate to" any ERISA plan "in the normal sense of the phrase." There was no "reference to" or "connection with" ERISA or an ERISA plan in this case. The Plan that was the subject of *Tru-Tech* is long gone and the obligations thereunder adjudicated and reduced to judgment; the respondent's case here does not turn at all on any reliance on or parsing of the Tru-Tech Plan or any specific provision of ERISA.[14] Indeed, the

[14] This is made clear by contrast with cases finding preemption, such as *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). There, a state action for wrongful discharge to avoid paying pension benefits was held preempted because the existence and terms of the plan were "critical" to establishing liability in the state claim. 498 U.S. at 140. Moreover, preemption was also required because the state claim "conflict[ed] directly with an ERISA cause of action." 498 U.S. at 142; *see also FMC Corp. v. Holliday*, 498 U.S. 52, 59-60 (1990) (state statute preempted where it both refers directly to benefit plans and subjects "plan administrators to conflicting state regulations").

Amended Complaint invokes no specific provision of ERISA, and alleges no violation of the Plan. The absence of any connection with or reference to ERISA highlights the error of creating an ERISA rule of decision to govern this case.

The inapplicability of ERISA preemption here, and hence the need to look to state law for the rule of decision, is highlighted by this Court's recent exegesis of the proper scope of ERISA preemption. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995), the Court considered whether a New York state law imposing surcharges on hospital patients covered by commercial insurers was preempted by ERISA to the extent that it imposed surcharges on patients whose health insurance was purchased by plans governed by ERISA. In analyzing this matter, the Court stated the "starting presumption that Congress does not intend to supplant state law," 115 S. Ct. at 1676, and emphasized that the question of preemption turns on congressional intent, *id.* at 1677. Concluding that the statutory term "relate to" is unhelpfully vague, the Court turned to legislative history to conclude that in enacting ERISA's preemption provision, Congress intended

> to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . ., [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

Id. (quoting *Ingersoll-Rand*, 498 U.S. at 142). The goal of a "nationally uniform administration of employee bene-

fit plans," 115 S. Ct. at 1678, was held not to be impeded by a statute imposing only an "indirect economic influence" on plan decisions, but which did "not bind administrators to any particular choice and thus function as a regulation of an ERISA plan itself." 115 S. Ct. at 1679. The state statutes in question were accordingly held not to be preempted.

The case against preemption is even stronger in the instant case. It would be sheer fancy to assume that the prospect of facing state veil-piercing standards, rather than a federal common law standard, would exert even "indirect economic influence" over plan administration decisions; it certainly will not "bind plan administrators to any particular choice" in directing their plans, or require the "tailoring of plans" on a state-by-state basis.[15] Allowing the states to maintain their traditional standards for veil piercing would do nothing to undermine a "uniform body of benefits law."

In sum, ERISA does not preempt state veil-piercing law. It follows that suits such as this one are not governed by ERISA. *See O'Melveny & Myers*, 114 S. Ct. at 2054 ("matters left unaddressed in [a comprehensive and detailed regulatory] scheme are presumably left subject to the disposition provided by state law"); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 70 (1966) ("[e]ven where there is related federal legislation in an area, as is true in this instance, it must be remembered that Congress acts . . . against the background of the total *corpus juris* of the states").

[15] This absence of any impact on the plan in question serves to allay the concerns expressed by the dissenting Justices in *Mackey*. In the dissent's view, "state garnishment laws necessarily relate to employee benefit plans to the extent they require such plans to act as garnishees, which is a substantial and onerous obligation." 486 U.S. at 842 (Kennedy, J., dissenting). There is no comparable burden in a veil-piercing case. Its very point is to reach beyond the plan, and beyond those adjudged to be its fiduciaries, to some even more remote party. The plan is not burdened by such a suit, and would typically not even be a party.

3. *Piercing of the Corporate Veil Is a Matter Traditionally Committed to the States, Which Are Competent to Adjudicate Such Issues.*

Corporate law in general and the standards for piercing the corporate veil in particular are quintessential matters of state law. Accordingly, the strong presumption is that state law should govern here. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 183 (1989) ("as a rule we should be and are reluctant to federalize matters traditionally covered by state common law" (internal quotation omitted)).

Mackey and *New York State Conference* show that there is no reason to depart from this presumption where, as here, the exposure of ERISA plans to state law regimes will do nothing to thwart the goal of "a uniform body of benefits law." *New York State Conf.*, 115 S. Ct. at 1677. This is consistent with the general presumption that state law, and not federal law, will provide the rule of decision in a matter not addressed by federal statute. *See generally O'Melveny*, 114 S. Ct. at 2055 (improper to create federal common law except when there is a "significant conflict" between state law and "an identifiable federal policy or interest"); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979) (identifying factors for analysis in considering whether presumption in favor of applying state law has been overcome, and applying state corporate law under federal statute); *City of Milwaukee*, 451 U.S. at 312-13 ("[f]ederal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision"); *cf. Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98-99 (1991) (where federal law is silent, state law typically supplies the applicable rule of decision).

Application of the relaxed federal common law standard for piercing the corporate veil adopted below would upset

the settled commercial expectations of those who availed themselves of the corporate form with the understanding that state law would govern the circumstances under which the general rule of limited liability would be abrogated.[16] *See Kimbell Foods*, 440 U.S. at 739 & n.42 (noting that it thwarts legitimate expectations when special federal laws trump established commercial rules). It would also have the anomalous effect of granting a preference to creditors holding an ERISA judgment, since they may be able to collect from the alter ego under the relaxed standard when other creditors cannot.

Of course, if state law supplies the rule of decision, there is no basis for trying the case in federal court at all—particularly in a situation such as this one, where there is no related matter pending in federal court and no gain in efficiency. State courts deal on a daily basis with

[16] The standard adopted below is noteworthy not only because it adopts a "liberal veil-piercing standard." Pet. App. 23a. It also departs from the typical common law rule, and settled expectations, by imposing alter ego liability on a party who was *not* the corporate alter ego at the time of the wrong for which liability is being imposed. Even if one assumes *arguendo* that petitioner became Tru-Tech's alter ego by virtue of the transfers alleged in this case, it is clear that the finding in *Tru-Tech* that petitioner was not a fiduciary means that he was not Tru-Tech's alter ego at the time of the ERISA breach. If he had been Tru-Tech's alter ego at that time, he would have had the kind of control or authority over the Plan that would have made him a fiduciary.

By thus imposing liability on petitioner for a corporate wrong that occurred before he became the alter ego of the corporation, the court below established a federal common law principle at variance with the general law of corporate veil piercing. *See 1 Fletcher Cyclopedia Corporations* § 41.10 (Perm. ed. 1990) (by piercing the corporate veil, "the court merely disregards the corporate entity and holds the individual responsible *for his or her acts knowingly and intentionally* done in the name of the corporation"; existence of a corporate entity will be disregarded when "the corporate entity *as to this transaction had at the time* no separate mind, will or existence of its own," and the alter ego's control "*proximately cause*[*d*] *the injury*" (emphasis added)).

questions of the permeability of the corporate veil, and there is no reason to doubt their competence in such areas. *See Kokkonen*, 114 S. Ct. at 1677 (enforcement of agreement settling federal case "is for state courts, unless there is some independent basis for federal jurisdiction"). Our argument is not that there should be no remedy for improper transfers out of a financially ailing ERISA fiduciary. The remedy, however, is provided by state law, in state court, for improper transfers out of any financially ailing corporation; the mere fact that the corporation was an ERISA fiduciary is no basis for federalizing the issue.[17]

Finally, as a practical matter, federalizing the law of veil piercing would be unlikely to yield any greater uniformity than the simple application of state law principles of alter ego or preferential transfers. The rules of the various states with respect to these fundamental common law principles are likely to resemble one another at least as much as the free-hand creations of disparate jurists striving to model new federal common law doctrines to fit their individual perceptions of the needs of ERISA in a particular case. *See City of Milwaukee*, 451 U.S. at 325 ("any judicial approach applying federal common law" will be "ad hoc" and "sporadic"); *O'Melveny*, 114 S. Ct. at 2055 (observing "the runaway tendencies" of "untethered" federal common law). Pension fund managers would find greater predictability in a clear rule that settled state law would govern

[17] *See* J.A. 48 (plea in respondent's Complaint for state law relief in this case). It should be noted that the applicable state law remedy may not be a rule of veil piercing. The typical remedy for improper transfers out of an insolvent corporation is rescission of the offending transfers. *See Hickman v. Hyzer*, 401 S.E.2d 738, 740 (Ga. 1991) (An action against directors to recover sums improperly paid out by an insolvent corporation "does not pierce the corporate veil. Instead, it simply rescinds improper payments to shareholders or directors so that funds are available for the payment of corporate debts."). Assuming some or all of the transfers in this case were improper, the remedy would be restitution to the corporation by petitioner of the value of those transfers, not general assumption of all of Tru-Tech's liabilities.

the alter ego determination than in a welter of evolving federal positions.

In summary, by federalizing and liberalizing the doctrine of veil piercing, the court of appeals would free federal courts to impose ERISA liability on corporate officers and shareholders whenever such a result is deemed consistent with the policy of ensuring full collection of all ERISA judgments. Not only is this doctrine without support in the text of ERISA; it flies in the face of this Court's teachings in *Mertens*. Congress has fully specified, through ERISA's definition of fiduciary, the circumstances in which such liability is proper. That test has already been applied to petitioner in *Tru-Tech*. The maintenance of a second ERISA suit against him was improper and should be reversed. If state law provides to respondent a remedy outside of ERISA, that remedy is properly pursued in state court.

II. A FEDERAL COURT DOES NOT HAVE ANCILLARY JURISDICTION OVER A SECOND LAWSUIT, SHARING NO COMMON NUCLEUS OF OPERATIVE FACT WITH THE FIRST LAWSUIT, BROUGHT SOLELY TO EXPAND THE JUDGMENT FROM THE FIRST LAWSUIT TO INCLUDE A THIRD PARTY.

It appears that the panel below had some trepidation over creating from whole cloth an ERISA cause of action for "piercing the corporate veil," for its opinion relies for subject matter jurisdiction, not on ERISA's general grant of jurisdiction over cases arising under ERISA, 29 U.S.C. § 1132(e)(1), but on the proposition that this lawsuit is "ancillary" to *Tru-Tech*.[18] The court of appeals' use of

[18] If this Court concludes that ERISA does not provide a cause of action for piercing the corporate veil, the judgment below must be reversed regardless of whether or not ancillary jurisdiction might be available in circumstances like this. Before the district court, petitioner submitted uncontradicted affidavits showing that he did not have contacts with South Carolina sufficient to justify personal jurisdiction over him. The district court ignored petitioner's lack of contacts with South Carolina, reasoning that ERISA's provision for nationwide service of process, 29 U.S.C. § 1132(e)(2), meant that personal jurisdiction could be asserted over petitioner as long as he had minimum contacts with the United States as a whole. Pet. App. 62a-65a.

The Fourth Circuit was silent on this matter, although it was raised below. That court's reliance on ancillary jurisdiction for subject matter jurisdiction does not settle the question of personal jurisdiction, however. If this is not an ERISA case, ERISA's nationwide service of process provision cannot apply, and petitioner cannot be haled into court in South Carolina.

ancillary jurisdiction is directly contrary to this Court's decision in *H.C. Cook Co. v. Beecher*, 217 U.S. 497, which is exactly on point, and to this Court's recent decision in *Kokkonen v. Guardian Life Insurance Co.*, 114 S. Ct. 1673.

A. Under This Court's Decision in *Beecher*, Ancillary Jurisdiction Is Unavailable.

This Court has emphasized that in determining whether ancillary jurisdiction is available, "the context . . . is crucial." *Owen*, 437 U.S. at 376. The context of this action is an attempt to impose an existing judgment on a *new* party through a *new* action asserting a *new* claim on the basis of *new* facts. This Court has addressed exactly this context in *Beecher* and held that there is no ancillary jurisdiction.

In *Beecher*, the plaintiff company had obtained a judgment against a rival corporation for infringement of a patent. The judgment was uncollectible, allegedly as a result of actions taken by the directors of the corporate judgment debtor, actions that would enrich the directors and that would ensure that the defendant company would be insolvent in the event of a judgment against it in the initial suit. Subsequent to the judgment against the corporation, the plaintiff brought a separate action against those directors, which Justice Holmes characterized for

the unanimous Court as "an attempt to make the defendants answerable for the judgment already obtained." 217 U.S. at 498. Emphasizing that the complaint instituting the second action did not deal with the patent, while setting forth the existence of the prior judgment in detail, the Court ruled that the attempt to impose liability on the directors was "of course" not "ancillary to the judgment in the former suit." 217 U.S. at 499.[19] "[I]f the directors are under obligations by Connecticut law to pay a judgment against their corporation, that is not a matter" conferring federal court jurisdiction. *Id.*

Beecher is plainly controlling here. This case, like *Beecher*, is an attempt (i) in a second, separate lawsuit (ii) to invoke a claim and facts not in issue in the prior lawsuit (iii) in order to hold liable for a prior federal judgment (iv) a person not adjudged liable in that lawsuit and not already within the federal court's jurisdiction.[20] Because the second action was held not to be ancillary in *Beecher*, the second action here cannot be ancillary.

The distinction of *Beecher* offered by the court below is not persuasive. The court sought to distinguish *Beecher* on the timing of the alleged wrongs by the individual defendants in the two cases. It contrasted petitioner's alleged purpose of "evading the already-extent [*sic*] judgment against Tru-Tech" with the *Beecher* defendants' actions, taken while that suit was still pending. 39 F.3d at

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[19] The opinion of the court of appeals in *Beecher* aptly describes the situation in this case. It characterized the attempt to force the directors of the insolvent judgment debtor to pay the judgment as "new matter, . . . growing out of the relationship between the corporation and its directors, [which] is in no sense of the word a patent case. . . . Neither the validity of the patent nor its infringement is put in issue by the complaint." *H.C. Cook Co. v. Beecher*, 172 F. 166, 167 (C.C.D. Conn. 1909). Similarly, neither ERISA nor the ERISA plan is at issue in this case.

[20] *See infra* note 29.

501.[21] This distinction, however, furthers the argument against ancillary jurisdiction here. It serves only to emphasize that petitioner's asserted wrongdoing was entirely divorced in time from the ERISA wrong for which Tru-Tech was held liable, thus highlighting the absence of any factual interconnection between *Tru-Tech* and the instant case. Ancillary jurisdiction is even *less* appropriate here than in *Beecher*.[22]

Beecher is correct and controlling. It dictates reversal.

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[21] The court of appeals also seems to suggest that petitioner was more culpable than the *Beecher* defendants, by characterizing the actions of the *Beecher* defendants as "acting within their legal capacity," but this peek at the merits can hardly have an influence on the availability of ancillary jurisdiction.

[22] Several recent federal court decisions have agreed with *Beecher* that ancillary jurisdiction is unavailable in circumstances like this. *See Sandlin v. Corporate Interiors, Inc.*, 972 F.2d 1212, 1216 (10th Cir. 1992) (rejecting attempt by a successful plaintiff to enforce his judgment against alleged alter egos of the judgment debtor, the court stated that "[w]hen a party asserts a post-judgment claim against a nonparty not arising out of the operative facts that produced the original judgment, an independent basis for federal jurisdiction must exist"); *National Westminster Bank U.S.A. v. Cheng*, 751 F. Supp. 1158, 1160 (S.D.N.Y. 1990) (declining ancillary jurisdiction in separately filed lawsuit, because there was no nexus between the original claim and the veil-piercing action, and relying on *Manway Construction Co. v. Housing Auth.*, 711 F.2d 501, 504 (2d Cir. 1983); "petitioner's theories of fraudulent conveyance and piercing the corporate veil are removed from the original breach of contract action . . . . [p]etitioner's claims involve investigation into the facts of how the corporations at issue were run . . ."); *Berry v. McLemore*, 795 F.2d 452, 455 (5th Cir. 1986) (refusing to exercise ancillary jurisdiction over an attempt to collect a judgment from the alleged indemnitors of the judgment debtor, where a "*new and independent action*" was filed to enforce "alleged obligations . . . [that] are completely independent of the primary judgment" sought to be enforced); *see also* cases cited *infra* note 30.

B. This Case Does Not Fall Within the Established Categories of Ancillary Jurisdiction Recognized by This Court.

In *Kokkonen*, this Court provided a taxonomy of ancillary jurisdiction: the doctrine has been used (i) to allow unified disposition of claims that are factually interdependent, and (ii) to provide necessary protection of a court's ability to function successfully. 114 S. Ct. at 1676. Each of these species of ancillary jurisdiction has a constitutional as well as a prudential dimension.

The federal courts are courts of limited jurisdiction, empowered to entertain cases only where there is both constitutional and congressional authorization. *Kokkonen*, 114 S. Ct. at 1675; *Owen*, 437 U.S. at 371-73. Article III, Section 2 of the Constitution defines the limit of federal judicial power. It extends that power to, among other controversies, "all Cases . . . arising under . . . the Laws of the United States." Until the proponent of jurisdiction establishes a basis for jurisdiction, "[i]t is to be presumed that a cause lies outside this limited jurisdiction." *Kokkonen*, 114 S. Ct. at 1675.

The Fourth Circuit reversed this presumption, concluding that there was "simply no practical reason to treat this litigation as separate from the initial litigation." Pet. App. 17a-18a. The court reached this conclusion without expressly considering whether this case and *Tru-Tech* were a part of the same constitutional case or controversy.[23] After recognizing that the only basis for federal jurisdiction was "the fact that the suit seeks to enforce a judgment obtained pursuant to ERISA," Pet. App. 11a n.6, the court inquired into whether this case and *Tru-Tech* were "truly 'independent.'" *Id.* at 15a. Relying on the

[23] This Court has treated the terms "case" and "controversy" as essentially coterminous. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937) ("The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.").

proposition that "an attempt to pierce the corporate veil is necessarily subsidiary to some primary cause of action," *id.* at 16a, the court reached the somewhat circular conclusion that since this action must be subsidiary to *something*, and that something must be *Tru-Tech*, it followed that *Tru-Tech* conferred ancillary jurisdiction over this case.

In fact, this case does not fall under either head of ancillary jurisdiction identified in *Kokkonen*. There is no factual interdependence between this lawsuit and *Tru-Tech*, and no judicial or administrative imperative dictates that this action be tried in a federal court.

1. *This Case and* Tru-Tech *Share No Common Nucleus of Operative Fact.*

The first type of ancillary jurisdiction identified by *Kokkonen*, that exercised when the primary and ancillary matters are factually interdependent, corresponds to the primary test enunciated by this Court for determining when two matters are part of the same constitutional case or controversy. It asks whether the ancillary matter and the primary matter already before the court share a common nucleus of operative fact. *See Owen*, 437 U.S. at 371 (it is "apparent" that the common nucleus test set forth in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) "delineated the constitutional limits of federal judicial power").

This test also contains a prudential element. If there is no factual overlap between the two cases, there is no efficiency in bringing the second matter into federal court. As was the case here, the federal court will do exactly what a state court faced with the same case would do. It will conduct a full trial. The putatively ancillary case cannot be decided on the basis of the record in the prior action.

It is readily apparent in this case, as it was in *Kokkonen*, that there is no factual connection between the pri-

mary case and the putatively ancillary one. Liability in *Tru-Tech* was premised on decisions regarding the maintenance and dismantling of the Plan. These decisions were made sporadically between 1981 and 1985, and suit was brought in 1987. The alleged wrongs here, by contrast, were subsequent transfers of assets held by Tru-Tech that respondent claims should have been available to satisfy the *Tru-Tech* judgment. There is no common nucleus of fact here.

Indeed, although the Fourth Circuit never expressly conducted a common nucleus inquiry (or any other constitutional analysis), the court acknowledged several times in its opinion that there is, beyond the judgment itself, no factual nexus between this case and *Tru-Tech*.[24] The facts underlying the two claims "have nothing to do with each other; it would neither be necessary nor even particularly efficient that they be adjudicated together." *Kokkonen*, 114 S. Ct. at 1676. Ancillary jurisdiction cannot rest in this case on factual interdependence with *Tru-Tech*.

2. *This Separate Lawsuit Cannot Be Maintained on the Premise That It Was Necessary to "Enforce" the Prior Judgment.*

This leaves, as in *Kokkonen*, the question of whether the second type of ancillary jurisdiction—which we call here for purposes of reference "necessary" ancillary ju-

[24] *See* Pet. App. 15a (distinguishing *Beecher* because alleged wrongs here were directed to "already-extent [*sic*] judgment"); *id.* at 16a (presumably on same basis, acknowledging that "Thomas may not have been able to pursue this litigation at the same time as the initial litigation"); *id.* at 17a n.10, (this case involves "conduct by Peacock occurring after the judgment in the initial litigation"); *id.* n.11 (respondent could not have pursued his veil-piercing claim in *Tru-Tech* "because most of the actions which led the district court to its conclusion had then yet to occur"); *id.* at 19a n.14, (activity leading to conclusion of veil piercing here occurred "*after* the activity pursuant to which the corporation is deemed to have breached its ERISA fiduciary duties"); *see also id.* at 11a n.6.

risdiction—can be asserted. This is ancillary jurisdiction "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen*, 114 S. Ct. at 1676.

It bears emphasis that the doctrine of ancillary jurisdiction, by its very nature, is applied for the purpose of extending the reach of a federal court's jurisdiction; accordingly, the doctrine's use must be subjected to searching Article III scrutiny. *See The Steamer St. Lawrence*, 66 U.S. (1 Black) 522, 526 (1862) ("there is a wide difference between the power of the court upon a question of jurisdiction and its authority over its mode of proceeding and process"). The Fourth Circuit did not engage in such careful constitutional scrutiny.

In support of its invocation of ancillary jurisdiction, the Fourth Circuit invoked *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166 (1868). The Fourth Circuit did not analyze the facts of *Riggs* or its actual holding.[25] Instead, the Fourth Circuit relied exclusively on the following passage from *Riggs*:

> [T]he jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. . . . Process subsequent

[25] The holding of *Riggs* is inapposite. In *Riggs*, a bondholder had obtained a judgment against the county that issued the bonds. When a state court issued an injunction against the levying of the tax necessary to pay the bonds (and the judgment), the plaintiff returned to federal court for a writ of mandamus directing the levying of the tax. Thus, *Riggs* did not impose liability on a stranger to the judgment. Rather, it directed compliance with the court's order by the party with the authority to render that compliance. The Court characterized the use of the writ of mandamus as "a substitute for the ordinary process of execution to enforce the payment" of a judgment. 73 U.S. at 198.

The Fourth Circuit improperly elevated the expansive language of the *Riggs* dictum above the *Beecher* holding. With respect to ancillary jurisdiction, "[i]t is to the holdings of our cases, rather than their dicta, that we must attend." *Kokkonen*, 114 S. Ct. at 1676.

> to judgment is as *essential to jurisdiction* as process antecedent to judgment, *else the judicial power would be incomplete and entirely inadequate* to the purposes for which it was conferred by the Constitution.

73 U.S. (6 Wall.) at 187 (emphasis added).

The limiting principle on the *Riggs* dictum is that ancillary jurisdiction must be "essential" to avoid rendering the judicial power "incomplete and entirely inadequate." *See also Kokkonen*, 114 S. Ct. at 1677 (no ancillary jurisdiction where not "essential to the conduct of federal-court business"); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801 (1987) (the rationale for court's inherent authority to appoint a private prosecutor "is necessity"); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (because "inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion"); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (federal court's inherent powers are those which "are necessary to the exercise of all others").

This limitation to matters that are *necessary* to the court's functioning is the mechanism that prevents an assertion of ancillary jurisdiction from straying beyond a single constitutional "case," as is required by Article III.[26] When dealing with the doctrine of necessary ancillary jurisdiction, of course, the familiar common-nucleus test for determining what constitutes a single constitutional case cannot be applied. Matters over which necessary

[26] As the Fourth Circuit has elsewhere noted, with respect to the "inherent power" of courts, "[w]hile this principle is sound under appropriate circumstances, it is not a principle of *federal* jurisdiction. . . . In our view, the inherent power of a district court to enforce settlement agreements, like any other power inherently vested in a federal court, presupposes the existence of federal jurisdiction over the case or controversy." *Fairfax Countywide Citizens Ass'n v. Fairfax County*, 571 F.2d 1299, 1304 (4th Cir. 1978).

ancillary jurisdiction has been asserted, such as contempt, sanctions for misconduct, and attorney's fee awards, *see, e.g.*, cases cited in *Kokkonen*, 114 S. Ct. at 1676, typically do not share a factual nexus with the substantive claims in the primary proceeding. A contempt proceeding in an antitrust action, for instance, may deal with the contumely directed to the court by counsel but never touch on tying arrangements. What the two proceedings do share in such a circumstance is that they arise within the same lawsuit—that is, the same filed "case"—and resolution of the ancillary matter is essential to protect the integrity of that case.[27] *See Willy v. Coastal Corp.*, 503 U.S. 131, 138 (1992) ("determination of a collateral issue" such as Rule 11 sanction "implicates no constitutional concern" because it is not an adjudication of the merits of a separate claim); *Curry v. Del Priore*, 941 F.2d 730, 731 (9th Cir. 1991) ("Ancillary jurisdiction permits courts to adjudicate matters that arise during the course of an action and affect the court's ability either to render an efficacious judgment or to control the litigation before it.").

Thus, any exercise of ancillary jurisdiction that does not rely on a common nucleus of operative fact must be *necessary* to the court's function in adjudicating a given case. It cannot be enough that respondent holds a judgment that was entered by a federal court. As Judge Posner has observed, the federal courts should not use "so formless a concept as inherent power to give the federal courts

[27] It makes sense that the bounds of "necessary" ancillary jurisdiction would correspond to the boundaries of a given lawsuit. Courts function with respect to particular and discrete filed *cases*. Any concern over an impediment to the court's ability to function will thus arise within the context of such a filed case; any irritant to the court that does not arise in such a context by definition will not impair the court in its core business, and is therefore too far afield to fall within the constitutional limits on ancillary jurisdiction.

an indefinite jurisdiction over disputes in which the federal interest may be nonexistent." *McCall-Bey v. Franzen*, 777 F.2d 1178, 1187 (7th Cir. 1985).[28]

Federal court jurisdiction is not necessary here. This case does not fall among those in which ancillary jurisdiction is asserted over matters—such as contempt, sanctions, or attorney's fees—related to the conduct of trial in federal court. The *Tru-Tech* proceedings were long finished before the acts complained of here occurred.

Nor, as *Kokkonen* makes clear, can ancillary jurisdiction be justified here on the premise that this new action is necessary to enforce the *Tru-Tech* judgment. The judgment in *Tru-Tech* was that the plaintiffs should collect money from Tru-Tech—and *not* from petitioner. This proceeding does not seek to enforce or vindicate that order. It effectively seeks to overturn it, with a new claim and a

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[28] 28 U.S.C. § 1367, which codifies elements of the doctrine of ancillary jurisdiction under the head of "supplemental jurisdiction," does not apply to this case. First, § 1367 applies only to actions commenced "on or after the date of the enactment of [the Judicial Improvements Act of 1990]," which was December 1, 1990. Pub. L. 101-650, Sec. 310. *Tru-Tech*, the only civil action to which this case could be "supplemental," was commenced well before this December 1, 1990 effective date. *See Sandlin*, 972 F.2d at 1215 n.3. Moreover, the language of § 1367 makes plain that it serves only to supplement jurisdiction in a case currently pending, not to provide jurisdiction over an entirely new case. *See* 28 U.S.C. § 1367 ("*in any civil action* of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction . . ." (emphasis added)). The statute does not apply to a circumstance like this one.

Even if § 1367 did apply here, the result would not change. The purpose of § 1367 was to extend the availability of the statutorily defined "supplemental jurisdiction" to Article III's case or controversy limit. *See* H.R. Rep. No. 101-734, 1990 U.S.C.C.A.N. 6860, 6874. Because the exercise of ancillary jurisdiction below exceeds the bounds of Article III, the result is the same here whether or not § 1367 applies.

new substantive remedy against a person expressly absolved of liability.[29] Such an enterprise amounts to a new case.

In *Kokkonen*, as here, the action did not seek to enforce the express terms of the district court's order, but to expand those terms to include additional matter. Accordingly, the Court held that ancillary jurisdiction was not available because it was not "essential to the conduct of federal-court business." 114 S. Ct. at 1677. *Kokkonen* holds that federal jurisdiction could be had only if the terms of the settlement were made a part of the order; in other words, before ancillary jurisdiction becomes available, the alleged wrong must be a divergence from the terms of the court order. *Root v. Woolworth*, 150 U.S. 401, 410-11 (1893) (court has jurisdiction "to carry into effect its own orders . . . *when the subject-matter and the parties are the same in both proceedings*"; this jurisdiction exists "to avoid the *relitigation* of questions once settled between the same parties" (emphasis added)); *Dugas v. American Surety Co.*, 330 U.S. 414, 428 (1937) (availability of jurisdiction over bill to enforce prior decree is "subject to the qualification that the relief be not of a different kind or on a different principle"); *Riverdale Cotton Mills v. Alabama & Georgia Mfg. Co.*, 198 U.S. 188, 195 (1905) (federal court has ancillary jurisdiction to protect "title which it has decreed as against every one a party to the original suit and prevent that party from relitigating the questions of right which have already been determined"); *see also Lucille v. City of Chicago*, 31 F.3d 546, 548 (7th Cir. 1994) (where dismissal order incorporates some terms of settlement and not others, court has ancillary jurisdiction to enforce only those in the order;

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[29] A party absolved of liability in a prior action, and thus not subject to the money judgment in that action, plainly should be treated as a stranger to the judgment in that action for purposes of any subsequent action attempting to impose liability on that party. *Argento v. Village of Melrose Park*, 838 F.2d 1483, 1488 n.7 (7th Cir. 1988); *Skevofilax v. Quigley*, 810 F.2d 378, 384-85 (3d Cir. 1987) (*en banc*); *Berry*, 795 F.2d at 455 n.2.

violation of terms "*not* in the judgment cannot be thought to flout the court's order"); *Cooperative Transit Co. v. West Penn Elec. Co.*, 132 F.2d 720, 723-24 (4th Cir. 1943) (The "instant proceeding is not merely one to set aside or construe a decree." It "contains matter not before litigated by the same parties standing in the same interests," and is therefore "not ancillary.").

Here, the order was that Tru-Tech pay the judgment amount to respondent. The mere fact that the judgment turned out to be uncollectible does not entitle respondent to additional time in federal court to search for a more solvent defendant. This action does not seek to protect the integrity of the federal court's proceedings or its judgment; it seeks to protect the *holders* of that judgment. If the underlying statute does not give that remedy, however, there is no basis for the courts to supply it.

Finally, the availability of a state forum to try matters such as this one makes it even clearer that federal court jurisdiction over an action like this one is not "necessary." *Compare Julian v. Central Trust Co.*, 193 U.S. 93, 109-12 (1904) (resort to federal forum appropriate where federal court had retained jurisdiction and pending state court action would defeat its jurisdiction); *cf. Owen*, 437 U.S. at 376 ("ancillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them *in an ongoing action in a federal court*" (emphasis added)). There would not even have been an efficiency loss in committing this action to state court. The district court (in the person of a different judge from the one who presided over *Tru-Tech*) could not resolve this matter on the old record; a new trial was required, which could equally well have been conducted in state court.

The instant action was a new lawsuit with a new caption, begun with a new summons and complaint, with new service of process, and involving new theories of recovery, filed

against a party absolved of liability by the previous suit, which had already run its course on appeal. Such an independent action requires an independent source of federal jurisdiction.[30]

C. Congress Did Not Provide in ERISA for Federal Jurisdiction Over a Claim Such as This One. It Follows That Ancillary Jurisdiction Over This Claim Is Not "Necessary" to a Court's Functioning in the Context of ERISA.

ERISA is a comprehensive statute containing its own grant of federal jurisdiction. We have shown that ERISA makes no provision for maintenance of an action like this one, and indeed that its preemption provision leaves intact whatever state law claims respondent might have for the acts of which he complains. Congress did not deem it necessary for purposes of ERISA that an action such as this one be tried in federal court.[31]

Whatever the scope of ancillary jurisdiction in other contexts, it should not be used here to create a remedy that Congress did not see fit to provide in ERISA. Congressional action is extremely relevant to the scope of subject matter jurisdiction in general, and hence in this case to the determination of the breadth of subject matter jurisdiction that is "necessary" to the court's functions. *See*

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[30] *Berry*, 795 F.2d at 455 ("We can find no case where a court held that it had ancillary jurisdiction to consider claims in a *new and independent action* merely because the second action sought to satisfy or give additional meaning to an earlier judgment."); *Sederquist v. Court*, 861 F.2d 554, 558 (9th Cir. 1988) (ancillary jurisdiction will not extend to "a separate case against different defendants"); *Redding Ford v. California State Bd. of Equalization*, 722 F.2d 496, 498 (9th Cir. 1983) (same).

[31] Congress could, of course, have provided for federal jurisdiction simply by creating an ERISA cause of action to pierce the veil of any ERISA judgment debtor. *Cf. Carden v. Arkoma Associates*, 494 U.S. 185, 196-97 (1990) (leaving adjustments of diversity jurisdiction to Congress).

Owen, 437 U.S. at 373 (requiring reference to statutory scheme, and not just constitutional limits, in defining jurisdiction); *Aldinger v. Howard*, 427 U.S. 1, 17 (1976) (pendent "jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power *has* been extended by Congress"); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) ("exercise of the inherent power of lower federal courts can be limited by statute and rule"); *see also Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874) (court's inherent power to punish for contempts is "essential to the preservation of order in judicial proceedings," but "the power has been limited and defined" by congressional action). These principles are inconsistent with an expansive use of ancillary jurisdiction to reach new cases omitted from the statutory framework by Congress.

Congress has indicated clearly what remedies, and what jurisdictional reach, are necessary to serve the goals of ERISA. These congressional judgments suggest strongly that the federal courts' power is not rendered incomplete by their inability to entertain actions such as this one, designed to expand the remedies available under ERISA. Accordingly, such actions are not "necessary."

D. Prudential Limits Counsel Against the Exercise of Ancillary Jurisdiction Here.

Assuming *arguendo* that the Article III judicial power could in theory be stretched to reach a proceeding of this kind, that would not be the end of the matter. As this Court has recognized in such areas as standing and ripeness, it has discretion to set prudential limits on the exercise of jurisdiction. *See, e.g., Reno v. Catholic Soc. Servs., Inc.*, 113 S. Ct. 2485, 2495 n.18 (1993) (ripeness); *Nordlinger v. Hahn*, 505 U.S. 1, 17 (1992) (standing); *Wyoming v. Oklahoma*, 502 U.S 437, 450 (1992) ("we have imposed prudential and equitable limitations upon the exercise of our original jurisdiction"). Such

prudential limits are particularly appropriate to judicially created doctrines such as necessary ancillary jurisdiction.

Prudential considerations strongly counsel reversal here. The fundamental rationale of the Fourth Circuit was that a federal judgment confers federal jurisdiction over additional lawsuits that seek to identify *any* potentially responsible parties, and not just those already expressly adjudged liable. One can envision a wide variety of circumstances in which a judgment creditor from a federal question lawsuit (from antitrust to RICO to securities law) might seek to expand the pool of potentially responsible parties. Under the Fourth Circuit's rule, *any* such suit, proceeding on *any* legal theory of vicarious liability or asset tracing, would be ancillary to the prior federal suit because the second suit would seek to determine who is responsible for the judgment. This rule would open the federal courts to all manner of collection actions, which would have to proceed under state-law theories [32] or (as happened here) judge-made versions of the same theories that would have to be invented for each state-law theory. Moreover, depending upon the perceived purpose of the federal statute giving rise to the original judgment, the federal common law as to a given collection theory might well vary from one statute to the next. None of this is necessary to the functioning of the federal courts, nor is it consistent with the limits of Article III or sound principles of judicial administration. Ancillary jurisdiction does not give a successful plaintiff a permanent ticket of entry to the federal courts.

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[32] The Fourth Circuit's rationale could not be limited to veil piercing. It would extend, for example, from contribution and fraudulent conveyance issues to state statutory bases for liability, respondeat superior or other scope of employment doctrines, and construction of insurance contracts. *Argento*, 838 F.2d at 1502 (dissent) (opposing ancillary jurisdiction and identifying state issues thrust thereby into federal court).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (*l*) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169 (a)(2)(A) of this title); or

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

Supreme Court, U.S.
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No. 94-1453

In The

Supreme Court of the United States

October Term, 1995

D. GRANT PEACOCK,

Petitioner,

v.

JACK L. THOMAS,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

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QUESTIONS PRESENTED

1. Can a federal court pierce the corporate veil to impose liability for an ERISA judgment on a person found to be the alter ego of the liable corporation?

2. Was the action to enforce the ERISA judgment properly before the district court?

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STATUTORY PROVISIONS INVOLVED

Section 409(a) of ERISA, 28 U.S.C. § 1109(a), provides in pertinent part as follows:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title . . . shall be subject to such other equitable or remedial relief as the court may deem appropriate. . . .

Section 502(f) of ERISA, 28 U.S.C. § 1132(f), provides in pertinent part as follows:

> The district courts of the United States shall have jurisdiction . . . to grant the relief provided for in subsection (a) of this section in any action.

STATEMENT

This case involves two related actions by the Respondent, Jack L. Thomas ("Thomas") on behalf of the pension plan of Tru-Tech, Inc. ("Tru-Tech") and its participants. The first action established liability on the part of Tru-Tech for breach of fiduciary duty. Subsequent to the facts which gave rise to that action, the Petitioner, D. Grant Peacock, engaged in a course of conduct described in the district court's findings of fact found in the Petition for Certiorari on pages 40a through 42a. The findings of fact include the following:

1. The Petitioner "was the controlling shareholder and sole director of Tru-Tech" and "directed and controlled essentially all of its affairs." [Pet. App. 40a, ¶ 2].

2. "During the entire period from November 1986 through its ultimate dissolution in May of 1990, there was a failure to observe corporate formalities . . . and the corporate shell of Tru-Tech was merely a facade for the operation of the dominant will of [Petitioner]." [Pet. App. 40a, ¶ 3].

3. The Petitioner "directed the management of Tru-Tech's affairs to defeat the collection of the *Thomas* judgment by siphoning off the assets of the corporation to certain favored creditors owned or controlled by [Petitioner]." [Pet. App. 41a, ¶ 4].

4. The "assets of Tru-Tech were siphoned off by [Petitioner] pursuant to a corporate strategy developed by him. *It was the specific intent and purpose of this strategy to siphon off these assets* to favored creditors owned or controlled by [Petitioner] and to defeat collection of the *Thomas* judgment." [Pet. App. 42a, ¶ 7 (emphasis added)].

5. In his efforts to siphon off the assets of Tru-Tech, *"it was the specific intent of [Petitioner] to defraud the former employees of Tru-Tech* who were beneficiaries of the pension plan and to defeat their legitimate attempt to collect a lawful judgment." [Pet. App. 42a, ¶ 9 (emphasis added)].

6. "Under the facts of this case and in light of the clear legislative purpose of ERISA, it would be inequitable and unfair to allow Tru-Tech's corporate form to be misused for the purpose of depriving its employees of

their anticipated benefits and avoiding lawful financial obligations to an employee benefit plan under ERISA." [Pet. App. 42a, ¶ 11].

Evidence fully supporting all of these findings of fact is found in the district court's order in the Petition for Certiorari on pages 31a through 40a. This evidence includes two letters of Petitioner's Pittsburgh attorney dated November 28, 1988, and March 13, 1989, documenting the Petitioner's "settled . . . strategy" to "refrain" from payment of the *Thomas* judgment and keep his current attorneys involved in that appeal process while siphoning off the assets of Tru-Tech so as to render them judgment-proof. [Pet. App. 34a-35a]. Therefore, under the facts of this case, we have a Pennsylvania resident deliberately and successfully undermining the judgment of the United States District Court for the District of South Carolina in a way that both the district court and the Court of Appeals for the Fourth Circuit found to be utterly reprehensible. [*See* Pet. App. 15a, 24a, 41a and 42a].

The Fourth Circuit affirmed the district court's decision. In a unanimous opinion written by Judge Donald Russell and joined by Judge Widener and Senior Judge Chapman, the court held that the federal court had subject matter jurisdiction over the case because it arose under ERISA. Furthermore, the court ruled that the district court did not err by applying a federal common law standard for piercing the corporate veil.

Before tackling the authorities and policy considerations involved, we do take issue with Petitioner's characterization of the second of these two interrelated

actions as "a separate lawsuit brought for the purpose of collecting a prior federal judgment" [Petition for Certiorari, p. 2] and a "second, independent lawsuit." [Pet. Br. 2]. The Fourth Circuit rejected this same contention "that this suit is one merely to collect an outstanding judgment" [Pet. App. 11a] and that "once the plaintiff class won its judgment against Tru-Tech, it became a judgment creditor like any other." [Pet. App. 12a]. In rejecting this argument, the Fourth Circuit stated:

> We established above that an attempt to pierce the corporate veil is a matter of substantive law that determines *whether a corporate shareholder can be held liable for a preexisting judgment* entered against the corporation. An attempt to pierce the corporate veil, therefore, seeks to identify those parties against whom the judgment can be satisfied. . . . *[I]dentification of those parties who are liable* is necessarily antecedent to the procedural enforcement of the judgment against those parties. . . .

[Pet. App. 13a (emphasis added)]. This action, therefore, is not one to *collect* a judgment, but one to *establish liability* on the part of the Petitioner. If successful, Thomas may then be forced into the federal or state courts of Pennsylvania to *collect* his judgment against Petitioner, just as he was in his attempt to *collect* his judgment against Tru-Tech.

SUMMARY OF ARGUMENT

The decision of the Fourth Circuit is consistent with this Court's prior holdings and should be affirmed for the following reasons:

First, as held by the Fourth Circuit, liability was properly imposed upon the Petitioner under federal common law veil-piercing standards as an equitable remedy available under ERISA.

Second, as held by the Fourth Circuit under the doctrine of ancillary jurisdiction, federal courts have the inherent power and duty to protect their lawful judgments from "the assaults of the lawless." *See United States v. Barnette*, 376 U.S. 681, 699-700 (1964), *quoting Watson v. Williams*, 36 Miss. 331, 341-342 (1858). In addition to ancillary jurisdiction, the district court had jurisdiction under the broad, remedial scope and purposes of ERISA.

ARGUMENT

1. ERISA PERMITS THE APPLICATION OF FEDERAL COMMON LAW VEIL-PIERCING STANDARDS.

The policies of allowing a federal court to enforce its own judgments and of protecting the interests of participants in ERISA plans are the mainstays of the decisions of the district court and the Fourth Circuit. Allowing Thomas to pierce the corporate veil of Tru-Tech fits nicely into the ERISA remedial scheme. Such a remedy comfortably falls under the category of "other appropriate equitable relief" under ERISA § 502(a)(3). 29 U.S.C.

§ 1132(a)(3). In affirming the decision of the district court, the Fourth Circuit adopted a common equitable remedy which lies well within the bounds of ERISA's intended reach.

ERISA § 502(a) provides that

A civil action may be brought –

* * *

(2) . . . by a participant, beneficiary or fiduciary for appropriate relief under Section 1109 of this title; [or]

(3) by a participant, beneficiary or fiduciary . . . to obtain other appropriate equitable relief. . . .

29 U.S.C. § 1132(a)(2) and (3). The liability that was imposed upon the Petitioner by the Fourth Circuit was initially the liability of Tru-Tech for its breach of its duties as a plan fiduciary pursuant to ERISA § 409, 29 U.S.C. § 1109. The district court and the Fourth Circuit allowed Thomas to pierce the corporate veil of Tru-Tech as a means of providing "appropriate relief" or "appropriate equitable relief" under the terms of ERISA.

The relief provided to Thomas by the District Court and the Fourth Circuit does not broaden ERISA as the Petitioner asserts. The corporate veil of Tru-Tech was pierced to allow for the appropriate and adequate enforcement of the provisions of ERISA. The first section of ERISA states as follows:

> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employment benefit plans, *and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.*

29 U.S.C. § 1001(b) (emphasis added).

This Court has long acknowledged that "the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307, 322 (1939). ERISA was enacted in large part to protect employees from being deprived of their benefits, *See* 29 U.S.C. § 1001 (1982). ERISA clearly provides for piercing the corporate veil in this case where the Petitioner deliberately siphoned off Tru-Tech's assets in an effort to prevent the employees from collecting the money due them as a result of the first action. Had the Petitioner not been held accountable for the liability of Tru-Tech, which had been rendered worthless by his efforts, the enforcement provisions of ERISA would have been stripped of any significance. To permit such actions to escape scrutiny from the federal courts as a matter of law would transmute ERISA to a mere snare and illusion effectively eliminating the employee protection promised by Congress.

a. *Mertens* Does Not Preclude The ERISA Veil-Piercing Relief.

The Petitioner mistakenly believes that *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), would bar the veil-piercing relief awarded by the district court and the Fourth Circuit. *Mertens* is clearly distinguishable from this action. In *Mertens*, both the relief sought and the

defendant's actions giving rise to the plaintiff's claim were entirely different from this case.

The plaintiff in *Mertens* attempted to recover compensatory damages against a plan actuary for the actuary's role in the plan fiduciary's breach of duty. This Court refused to allow a separate cause of action to be brought under ERISA against a non-fiduciary for monetary damages. The relief awarded by the district court and the Fourth Circuit in the case at bar, however, did not arise from a separate cause of action for monetary damages but from an equitable remedy fashioned to further the policies of ERISA. "[A]n attempt to pierce the corporate veil is not itself a cause of action but rather is a means of imposing liability on an underlying cause of action, such as a tort or breach of contract." *Fletcher Cyclopedia of Corporation* § 41, p. 603 (Perm. ed. 1990). Unlike *Mertens*, a new cause of action is not being fashioned to permit recovery from a party not intended to be subject to such liability under ERISA. Thomas is merely seeking to keep an ERISA judgment from being rendered worthless by the wrongful acts of the Petitioner.

The holding in *Mertens* would allow "equitable relief" in an action against a nonfiduciary. "The alter ego doctrine is based in equity and is remedial in nature." 18 C.J.S. *Corporations* § 12, p. 280. Thomas concedes that the relief ordered by the district court and the Fourth Circuit would force the Petitioner to pay money to Thomas. However, the Petitioner's liability for such payment arises from a disregard for Tru-Tech's corporate form and from his disregard for the authority of the federal courts. The relief awarded by the district court and the Fourth Circuit does not subject a nonfiduciary to money damages. Such relief comes in the form of removing the

corporate veil to expose the Petitioner as the responsible party for Tru-Tech's judgment liability. The relief granted was removal of the veil, not the money damages.

The procedure followed by Thomas in seeking to enforce the ERISA judgment is analogous to another procedure available to enforce judgments commonly referred to as supplementary proceedings. "Supplementary proceedings are equitable in nature." *Ag-Chem Equipment Co., Inc. v. Daggerhart*, 315 S.E.2d 379, 381 (S.C. App. 1984), *citing The Firestone Tire & Rubber Co. v. Marlboro Cotton Mills*, 278 F. 816 (D.S.C.), *modified*, 282 F. 811 (4th Cir. 1922), *cert. denied*, 260 U.S. 749 (1923). Thus, there is no doubt this action involves "relief that [is] typically available in equity." *Mertens, supra*, 113 S. Ct. at 2069.

Another typical form of equitable relief mentioned by the Court in *Mertens* is restitution. While money damages may be exchanged as a result of a judgment for restitution, the remedy is nonetheless equitable. Here, the relief granted Thomas merely removes the corporate impediment, thereby necessitating a payment of money.

The Petitioner cites *Reich v. Rowe*, 20 F.3d 25 (1st Cir. 1995) as authority for his contention that "[e]ven if this action could be viewed as seeking equitable relief, it could not be maintained under ERISA . . . [because] there is no allegation of any violation of ERISA or an ERISA plan." [Pet. Br. 17, n. 8]. Distinguishable on its facts, *Reich* involves a claim against a financial consultant who provided services to an ERISA plan. *Reich* actually supports Thomas' claim. In *Reich*, the First Circuit explains:

> We are more willing to create common law remedies that are directed toward undoing specific transactions or recovering assets of an ERISA plan. In those situations, the parties are more likely to be in control of plan assets and thus functionally more likely fiduciaries.

Reich, supra, 20 F.3d at 33. The actions of the Petitioner in siphoning off assets of Tru-Tech should subject him to liability under the form of equitable relief fashioned by the Fourth Circuit.

In *Mertens,* this Court was concerned about disturbing the balance "between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs" provided by the ERISA civil enforcement provisions. *Mertens, supra,* 113 S. Ct. at 2072, *quoting Alessi v. Raybestos-Manhattan, Inc.,* 101 S. Ct. 1895, 1902 (1981). In this action, there is no danger that pension costs will rise if the Petitioner is held liable for the Tru-Tech judgment. The relief awarded by the district court and the Fourth Circuit will not "impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves." *Mertens, supra,* 113 S. Ct. at 2072. It is extremely doubtful that an insurance product is available to cover a person for intentionally siphoning off assets from his alter ego corporation. Imposing liability on the Petitioner may actually lower pension costs by allowing recovery against persons "functionally more like fiduciaries." *Reich, supra,* 20 F.3d at 33.

A final distinction between *Mertens* and the case currently before the Court involves the actions of the respective defendants. In *Mertens,* the plaintiffs, former

employees entitled to benefits under their employer's pension plan, attempted to hold the actuary for their pension plan liable after the actuary failed to provide accurate actuarial assumptions to the employer. As a result, the employer did not adequately fund the plan, and the employees were denied their full pensions. The actuary's shortcomings, however, pale in comparison with the dishonest, deceitful behavior of the Petitioner who masterminded and executed a scheme to "defeat the collection of the Thomas judgment by syphoning off the assets of the corporation. . . . " [Pet. App. 41a, ¶ 4]. Not only was it the specific intent of the Petitioner to "defraud the former employees of Tru-Tech," [Pet. App. 42a, ¶ 9], it was also his intent to scoff at the rulings of the federal courts. Petitioner's egregious and reprehensible behavior dwarfs the failures of the actuary in *Mertens.*

The Petitioner argues that relief in the form of piercing the corporate veil should not be available because ERISA already contains a standard for reaching beyond the corporation by way of ERISA's definition of "fiduciary." The actions of the Petitioner which exposed him to liability for the Tru-Tech judgment did not occur with respect to the administration or operation of the plan. The Petitioner's culpable behavior occurred after the breach of fiduciary duty from which the Tru-Tech liability arose. Therefore, the relief the Petitioner suggests as available to Thomas would not be available in this case. The only appropriate and adequate relief available to Thomas was that awarded by the district court and the Fourth Circuit.

b. State Courts Would Not Have Proved An Appropriate And Adequate Forum.

The Petitioner cites *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825 (1988), for authority that ERISA does not provide a means of enforcing ERISA judgments. This is not a fair representation of *Mackey*.

Mackey involved an action instituted in a state court of Georgia by a collection agency seeking to garnish the benefits of the members of an ERISA welfare benefits plan. The case also turned on the applicability of a Georgia state law prohibiting the garnishment of plan benefits covered by ERISA. In *Mackey*, this Court held that ERISA preempted the state garnishment procedure thereby setting aside the anti-garnishment provision, and, because ERISA did not provide a procedure for collecting judgments against plan participants, the judgment creditor was allowed to proceed against the plan assets.

The Petitioner enthusiastically embraces and relies upon this Court's statement in *Mackey* that "ERISA does not provide an enforcement mechanism for collecting judgments won. . . . " *Id.* at 833. The Fourth Circuit's decision, however, does not conflict with *Mackey*. The Petitioner's reliance upon this statement is misplaced. *Mackey* does not preclude the application of a federal common law veil-piercing rule in actions under ERISA. An attempt to pierce the corporate veil is not a means of collecting a judgment; it is a means of imposing liability. Applying the general purposes and principles of ERISA, Thomas seeks to pierce Tru-Tech's corporate veil in order to hold the Petitioner liable for the actions of his sham

corporation. This action clearly cannot be a mere collection action because Thomas may yet have to bring a collection action under state law to collect the judgment against the Petitioner if this Court affirms the Fourth Circuit's decision.

Mackey simply did not involve a judgment creditor seeking enforcement of an ERISA judgment. There is a definite distinction between a holding that ERISA does not provide a mechanism to enforce judgments against an ERISA plan and the assertion that ERISA does not provide an enforcement mechanism to enforce *ERISA judgments*.

Petitioner argues that ERISA does not preempt state laws regarding piercing the corporate veil and then leaps to the conclusion that, since ERISA does not preempt state law regarding piercing the corporate veil, suits such as this one are not covered by ERISA and must be brought under state law. As discussed above, Thomas' action to pierce the corporate veil of Tru-Tech is not a separate cause of action but simply a supplemental proceeding to impose liability for an ERISA judgment on a sham corporation's alter ego. Thomas is pursuing "other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). Any state statute or state court decision that attempts to regulate the availability of the veil-piercing remedy for ERISA judgments would be preempted. In *Mackey*, the Court stated as follows:

> Consequently, adhering to our precedents in this area, we hold that Ga. Code Ann. § 18-4-22.1, which singles out ERISA employee welfare benefit plans for different treatment under state garnishment procedures, is preempted under § 514(a). The state statute's

> express reference to ERISA plans suffices to bring it within the federal law's pre-emptive reach.

Mackey, supra, 486 U.S. at 830.

The Petitioner argues that "[a]llowing the states to maintain their traditional standards for veil-piercing would do nothing to undermine a 'uniform body of benefits laws.' " [Pet. Br. 24]. A federal court must be able to " . . . vindicate its authority, and effectuate its decrees . . . . " *Kokkonen v. Guardian Life Ins. Co. of America,* 114 S. Ct. 1673, 1675-1676 (1994). As the Fourth Circuit explained:

> [A]n attempt to pierce the corporate veil is necessarily subsidiary to some primary cause of action, it is not simply an attempt to collect a preexisting liability against an entity already found liable under the relevant substantive law; it is, rather, an attempt to impose such a preexisting liability upon an entity *not otherwise liable.*

[Pet. App. 12a].

The policy of protecting "the interests of participants in employee benefit plans" must be uniformly upheld. 29 U.S.C. § 1001(b). Such uniformity cannot be accomplished by forcing participants to resort to state law in instances such as the present action where the Petitioner has made a mockery of an ERISA judgment. If this Court holds that an action to pierce the corporate veil may only be brought under state law and not under a federal common law fashioned under ERISA, it would undermine the "uniform body of benefits law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 115 S. Ct. 1671, 1677 (1995). If the standards for enforcing an ERISA

judgment become a matter of state law, uniformity will effectively be written out of ERISA. By applying the federal veil-piercing standard enunciated by the First Circuit in *Alman v. Danin,* 801 F.2d 1 (1st Cir. 1986), the Fourth Circuit has not extended the causes of action available under ERISA, but has merely reinforced the remedies currently available under ERISA.

The ability of ordinary creditors of a corporation to look beyond the corporate veil for recovery is limited since such parties knowingly deal with an entity with limited liability. An ERISA plan participant, however, has a higher degree of expectation for recovery because the plan represents that a contribution will be made and administered pursuant to a fiduciary obligation. Such an expectation must be given preference over ordinary creditors. Such a preference can only be provided by a uniform enforcement procedure for ERISA judgments that would include a remedy allowing piercing of the corporate veil.

The Petitioner argues that piercing the corporate veil is a matter that should be left for adjudication by the states. Had this been a traditional state law contract or tort cause of action resulting in a judgment against the corporation by a federal court, the Petitioner's argument would be more persuasive. Because the veil-piercing remedy is sought as a result of an ERISA judgment, however, the mandates of ERISA demand an ERISA action to pierce the corporate veil.

In explaining the standard for piercing the corporate veil, which was later adopted by the Fourth Circuit in this case, the First Circuit in *Alman v. Danin* concluded:

> ERISA, the statute sought to be enforced here, cannot be said to attach great weight to corporate form. Indeed, deferring too readily to the corporate identity may run contrary to the explicit purposes of the Act. Congress enacted ERISA in part because many employees were being deprived of anticipated benefits, which not only reduced the financial resources of individual employees and their dependents but also undermined the stability of industrial relations generally . . . allowing the shareholders of a marginal corporation to invoke the corporate shield in circumstances where it is inequitable for them to do so and thereby avoid financial obligations to employee benefit plans, would seem to be precisely the type of conduct that Congress wanted to prevent.

801 F.2d at 3-4. If federal common law relating to piercing the corporate veil is not applied in situations such as the one before this Court, not only will the uniformity envisioned by ERISA be destroyed but plan participants will be denied the protection ERISA was designed to provide.

The Petitioner expresses concern that applying a federal common law doctrine of veil-piercing "would free federal courts to impose ERISA liability on corporate officers and shareholders whenever such a result is deemed consistent with the policy ensuring full collection of all ERISA judgments." [Pet. Br. 28]. It is simply unbelievable that this Court's decision affirming the Fourth Circuit would send shockwaves through the retirement plan industry. Liability has been imposed upon the Petitioner as a result of his willful acts designed to frustrate Thomas' collection of an ERISA judgment. Petitioner's actions could easily become the basis for a "How To"

manual on defeating ERISA judgments. Uniform standards for piercing the corporate veil which are aimed at preventing such actions would only affect parties with a similar blatant disregard for the federal courts and the policies and goals behind ERISA. In short, state law cannot adequately provide the necessary uniform remedy.

2. THE DISTRICT COURT PROPERLY EXERCISED JURISDICTION OVER THIS ACTION.

a. The District Court Had Jurisdiction Under the Doctrine of Ancillary Jurisdiction.

The doctrine of ancillary jurisdiction is described in 13 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3523 (1984) as follows:

> The most important instance in which the federal courts hear cases over which no subject matter jurisdiction is expressly conferred on them by the Constitution, or by federal statute, is when the ill-defined concept of "ancillary jurisdiction" is invoked. According to this concept, a district court acquires jurisdiction of a case or controversy in its entirety, and, as an incident to the disposition of the matter properly before it, it may decide other matters raised by the case of which it could not take cognizance were they independently presented. Thus, if the federal court has jurisdiction of the principal action, it also may hear any ancillary proceeding therein, regardless of the citizenship of the parties, the amount in controversy, or any other factor that normally would determine subject matter jurisdiction. . . .

As to the basic underlying purpose of ancillary jurisdiction, the treatise states further:

> Ancillary jurisdiction exists because without it the federal court neither could dispose of the principal case effectively nor *do complete justice* in the dispute that is before the tribunal. Viewed from this perspective then, the concept is a common-sense solution to the problems of piecemeal litigation that otherwise would arise by virtue of the limited jurisdiction of the federal courts prescribed in Article III and the complexity of many modern lawsuits.

Id. (emphasis added).

As to the scope of ancillary jurisdiction:

> The concept also is broad enough to include those acts that the federal court must take in order properly to carry out its judgment on a matter as to which it has jurisdiction. *This general principle is one of broad application,* although of rather uncertain limits. For example, it has been held that *mandamus* or *scire facias* will lie *to effectuate relief granted in the main action. . . .*

Id. (emphasis added).

In *Kokkonen, supra,* this Court described the "two separate, though sometimes related, purposes" of ancillary jurisdiction as follows:

> . . . Generally speaking, we have asserted ancillary jurisdiction . . . for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in

> varying respects and degrees, factually interdependent . . . ; and (2) *to enable a court to function successfully,* that is, to manage its proceedings, *vindicate its authority, and effectuate its decrees. . . .*

114 S. Ct. at 1675-1676 (emphasis added).

The concern of the federal courts for the vindication of their authority and the effectuation of their decrees is not a novel or recent phenomenon. It appears to have been foremost in the mind of Chief Justice Marshall in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), and has been a concern of this Court ever since.

As this Court noted in *Bank of the United States v. Halstead,* 23 U.S. (10 Wheat.) 51 (1825):

> The judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended, if after judgment, it could be arrested in its progress, and denied the right of enforcing satisfaction in any manner which shall be prescribed by the laws of the United States. The authority to carry into complete effect the judgments of the Courts, necessarily results, by implication, from the power to ordain and establish such Courts.

Id. at 53. This Court's decision in *Freeman v. Howe,* 65 U.S. (24 How.) 450 (1860), further emphasizes the jurisdiction of the federal courts over supplemental matters:

> The principle is, that a bill filed on the equity side of the court to retrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under *mesne* or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it

> had arisen, and is maintained without reference to a citizenship or residents of the parties.

Id. at 460.

In *Barnette, supra*, 376 U.S. at 699-700, when the authority of the federal judiciary was challenged and undermined by the Governor and Lieutenant Governor of Mississippi, this Court stressed the importance of enforcing the authority of the federal courts. The opinion by Justice Clark quoted with approval "the statement of the High Court of Errors and Appeals of Mississippi 105 years ago in *Watson v. Williams*, [36 Miss. 331 (1858)]." The Court referred to *Watson* as "a celebrated case that has been cited with approval in many state jurisdictions as well as cases in this Court," *Barnette, supra*, 376 U.S. at 695, and described the following quotation "as true and perhaps even more urgent today":

> A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it. . . . The power to compel the lawless offender, against decency and propriety, to respect the laws of its country, and to submit to their authority (a duty to which the good citizen yields hearty obedience, without compulsion) must exist, or courts and laws operate at last as a *restraint* upon the upright, who need no restraint, and a license to the offenders, whom they are made to subdue.

Certainly, a less persuasive case for the exercise of ancillary jurisdiction is found in *Board of County Commissioners of Labette County v. United States*, 112 U.S. 217

(1884). In that case, a judgment had been obtained in the Circuit Court of the United States for the District of Kansas against the Township of Oswego. The judgment against Oswego, like the *Thomas* judgment, remained unpaid. A Writ of Mandamus was then issued by that court directed to the Board of County Commissioners of Labette County requiring them to levy and collect sufficient taxes to satisfy the judgment. They demurred to the writ on the grounds that "the court has no jurisdiction of the persons of the respondents or the subject of the action." In rejecting that contention, in an opinion by Justice Matthews, this Court stated:

> The objection that the circuit court had no jurisdiction to issue its *mandamus* to the plaintiffs in error is based upon the supposition that, because they are not parties to the judgment against Oswego township, and are not officers of or representatives of that municipal corporation, but are officers of the county of Labette, the proceeding against them is the exercise of an original jurisdiction, which does not belong to that court. It is quite true, as it is familiar, that there is no original jurisdiction in the circuit courts in *mandamus*, and that the writ issues out of them only in aid of a jurisdiction previously acquired, *as is justified in such cases as the present as the only means of executing their judgments.* But it does not follow because the jurisdiction in *mandamus* is ancillary merely *that it cannot be exercised over persons not parties to the judgment sought to be enforced.* . . .
>
> The question is whether the respondents, to whom the writ is addressed, have the legal duty to perform, which is required of them, and

> whether the relator has a legal right to its performance from them, by virtue of the judgment he has already obtained. *If so, then they are, as here, the legal representatives of the defendant in that judgment, as being the parties on whom the law has cast the duty of providing for its satisfaction.* They are not strangers to it, as being new parties, on whom an original obligation is sought to be charged, *but are bound by it, as its stands, without the right to question it, and under a legal duty to take those steps which the law has prescribed as the only mode of providing means for its payment.*

Id. at 220-221 (emphasis added).

The respondents in that case became "the parties on whom the law has cast the duty of providing for [the] satisfaction" of that outstanding judgment by virtue of their office. Here, the Petitioner has made himself responsible for this judgment by his unlawful action in siphoning off the assets of Tru-Tech "to defeat collection of the *Thomas* judgment" and to undermine the lawful authority of the district court.

Petitioner erroneously asserts that *H.C. Cook Co. v. Beecher,* 217 U.S. 497 (1910) requires reversal of the Fourth Circuit's decision. Petitioner makes the astounding assertion that "the only link between this case and *Tru-Tech* is that Respondent's purpose is to obtain payment on the *Tru-Tech* judgment from *someone*. . . . " [Pet. Br. 13]. Thomas is not merely seeking payment from *someone*; he is seeking to impose liability on the sham corporation's alter ego – the Petitioner. The Fourth Circuit's decision is not in conflict with *Beecher. Beecher* addresses litigation which is truly independent from prior actions. Thomas' effort to pierce the corporate veil is not independent of

his prior litigation. As the Fourth Circuit indicated, "an attempt to pierce the corporate veil is necessarily subsidiary to some primary cause of action." [Pet. App. 12a].

It is also important to note that *Beecher* was decided before Federal Rule of Civil Procedure 69(a) was adopted. Rule 69(a) provides in pertinent part:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought. . . .

Thus, Rule 69(a) provides a procedural mechanism for a court's exercise of its inherent jurisdiction to enforce its judgments in supplemental proceedings.

The Fourth Circuit's decision is also in keeping with *Kokkonen, supra.* Although this Court in *Kokkonen,* as pointed out by the Petitioner [Pet. Br. 13], declined to extend the concept of ancillary jurisdiction to "a claim for breach of contract" arising out of a settlement agreement, there was no suggestion there, as here, that such action was necessary "to enable a court to function successfully" or to "vindicate its authority, and effectuate its decrees." *Kokkonen, supra,* 114 S. Ct. at 1675-1676.

The federal courts have inherent jurisdiction to enforce their judgments in supplemental proceedings.

> [I]f the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such

> judgment or decree. . . . [T]he jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied.

Riggs v. Johnson County, 73 U.S. (6 Wall.) 166, 187 (1867).

Just as clearly as the Governor and Lieutenant Governor of Mississippi sought to undermine the lawful orders of the district court and Court of Appeals in *United States v. Barnette, supra*, Petitioner has thus far successfully undermined the lawful orders of the district court and the Court of Appeals. This has been accomplished by what the district court characterized as "the specific intent and purpose of [Petitioner's] strategy to siphon off [the] assets [of the judgment debtor] to favored creditors owned or controlled by [Petitioner] and to defeat collection of the *Thomas* judgment." [See Pet. App. 42a, ¶7].

If the district court cannot "vindicate its authority and effectuate its decrees," *Kokkonen, supra*, through the doctrine of ancillary jurisdiction, then it will become, in the colorful language of *Watson v. Williams, supra*, "a disgrace to the legislation" that created it, "and a stigma upon the age which invented it."

b. The District Court Had Jurisdiction Under ERISA.

As discussed at length in Part 1, this is an action brought under the enforcement provisions of ERISA to enforce an ERISA judgment, not a separate cause of action. Although the doctrine of ancillary jurisdiction supports the district court's jurisdiction over this matter, jurisdiction is also provided by the provisions of ERISA.

The complaint in the first action invoked the court's equitable jurisdiction under ERISA by seeking relief both under ERISA § 409(a) and § 502(a). Under ERISA § 409(a), the court may grant "such other equitable or remedial relief as the court may deem appropriate." 28 U.S.C. § 1109(a). Under ERISA § 502(a), a plan participant may "obtain other appropriate equitable relief." 28 U.S.C. § 1132(a)(3).

The complaint in the present action incorporated the original complaint by reference in ¶5 [J.A. 44-45], specifically invoked the court's power to pierce the corporate veil "under ERISA and applicable federal law" [J.A. 49-50] and sought "such other relief as may be appropriate." As argued above, "applicable federal law" would include the doctrine of ancillary jurisdiction. Furthermore, under the broad remedial purposes of ERISA, appropriate equitable relief must be available to protect the interests of plan participants or ERISA itself becomes a toothless dragon offering no protection to vulnerable employees.

Furthermore, this action is not an independent action for monetary damages. The purpose of piercing the corporate veil is to prevent fraud or injustice. *See Taylor v. Standard Gas Co., supra*, 306 U.S. at 322. One would be hard pressed to imagine a more shocking example of injustice to plan beneficiaries than the Petitioner's efforts to subvert the authority of the federal courts by defeating the collection of a lawful judgment. Thomas does not bring an independent action for monetary damages; he brings an equitable action to satisfy a lawful judgment and thereby defend the authority of the court which issued it.

Public policy and the ends of justice support the extension of jurisdiction under ERISA to pierce the corporate veil and to impose liability upon those who would undermine the authority of our federal courts. Section 502(f) of ERISA provides that "district courts of the United States shall have jurisdiction . . . to grant the relief provided for in subsection (a) of this section in any action." 29 U.S.C. § 1132(f). As previously discussed, this action involves an attempt by a plan participant to enforce plan provisions by seeking to impose liability for an ERISA judgment on the Petitioner. This is a continuation of an ERISA action and, as such, is covered by the original jurisdiction afforded the action by ERISA.

Finally, under both the doctrine of ancillary jurisdiction and under ERISA, the provisions for nationwide service of process under ERISA are available to Thomas to allow him to enforce the ERISA judgment effectively and thus prevent Petitioner from rendering the ERISA civil enforcement provisions impotent. Pursuant to 29 U.S.C. § 1132(e)(2), "process may be served in any other district where a defendant resides or may be found." Thus, ERISA provides for nation-wide service of process.

CONCLUSION

For the reasons set forth above, the judgment of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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No. 94-1453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

D. GRANT PEACOCK,
Petitioner,

v.

JACK L. THOMAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. NEITHER ERISA NOR FEDERAL COMMON LAW PROVIDES A POST-JUDGMENT CAUSE OF ACTION FOR PIERCING THE VEIL OF A CORPORATE FIDUCIARY OR JUDGMENT DEBTOR.

Neither the Fourth Circuit nor the United States in its *amicus* brief argues that ERISA provides a cause of action in this case. Indeed, by leaping immediately to the last resort of ancillary jurisdiction, the court of appeals and the Government seem implicitly to concede this point. Because respondent and other *amici* argue in favor of an ERISA cause of action, however, and because the absence of an ERISA cause of action is relevant to the decision on ancillary jurisdiction, we deal first with ERISA.[1]

A. ERISA.

Respondent suggests in his brief, Resp. Br. at 5-6, for the first time in this litigation, that the action below can be justified as one pursuant to Section 502(a)(3) of ERISA, which authorizes the bringing of a civil action "to obtain other appropriate equitable relief (i) to redress such violations [of this subchapter or the terms of the plan] or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3)(B).

1. Section 502(a)(3) does not apply here. First, the relief sought and obtained here—a money judgment

[1] The existence *vel non* of an ERISA cause of action is particularly critical here, because in the absence of an ERISA cause of action respondent could not rely on ERISA's provision for nationwide service of process. *See* Pet. Br. at 28 n.18. Consequently, the Court would have to, at a minimum, remand for a proper determination regarding personal jurisdiction. Contrary to the suggestion of the United States, the Petition in this case expressly argued the personal jurisdiction issue as a basis for granting *certiorari* on the ERISA issue. Pet. at 18.

Finally, if there is no ERISA cause of action available in this case, the award of attorney's fees entered below cannot stand, since it is premised solely on ERISA.

against petitioner—plainly is legal, not equitable. In *Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2068 (1993), this Court stated plainly that "[m]oney damages are, of course, the classic form of *legal* relief." *See* Pet. Br. at 17 & n.8; *see also Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 134-37 (2d Cir. 1991) (carefully analyzing origin of doctrine of veil piercing and concluding that the doctrine "had equitable and legal components"; accordingly, action to pierce veil of judgment debtor to impose uncollected judgment on alleged alter egos, as an action which sought monetary damages, was legal and not equitable); 1 W. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 41, 1994 Cum. Supp. at 45 (veil piercing held to be legal issue where it "turns chiefly on disputed fact questions and the relief sought consists of damages").

Respondent and his *amicus* AARP seek to evade this principle by asserting that the remedy obtained here is an equitable "restitutionary" or "restorative" remedy. Resp. Br. at 9; AARP Br. at 11-12. This plain misstatement serves only to emphasize the legal nature of the remedy here. Petitioner was not directed to restore to Tru-Tech (and thence for the benefit of all its creditors) the notes and receivables that were transferred to Grant Peacock & Co.; he instead was subjected to a personal money judgment for $187,628.93, to be paid directly to respondent. The judgment below went far beyond "restoration" of the transfers out of Tru-Tech, imposing damages at more than twice the value of the property transferred.[2] The judg-

[2] As we have explained, the face value of the transfers at issue was less than $60,000—and their actual value was even less. Pet. Br. at 8 n.3. *Amicus* United States places the value at $80,000, presumably by failing to deduct from the transfers the cash paid for the $25,000 Uhlman note. U.S. Br. at 3; *see* C.A. 4 App. at 168. Even if one uses the United States' figure, and further assumes *arguendo* that no consideration was given for the transfers, the damages award alone in this case far exceeds any benefit obtained by petitioner. (Of course, the unrefuted evidence shows that the transfers in this case—contrary to the implication of the facile term "siphoning" favored by respondent—*were* supported by full and valid consideration. Pet. Br. at 8 n.3.) This is not a restitution case.

ment at issue here *improved* the *Tru-Tech* judgment by making collectible in full, out of petitioner's assets, what could not have been collected from Tru-Tech, which was insolvent even before the transfers in question.

2. Moreover, Section 502(a)(3) of ERISA could not salvage the judgment below, even if piercing the veil were an equitable remedy. Section 502(a)(3) authorizes equitable relief *only to redress a violation of ERISA or an ERISA plan*. ERISA "does not, after all, authorize 'appropriate equitable relief' *at large*." *Mertens*, 113 S. Ct. at 2067. In this lawsuit, there is no allegation of a violation of ERISA or a plan—indeed the suit makes no specific mention at all of the statute or the plan document. Instead, what is sought here is nothing more or less than relief "at large." Petitioner's alleged wrong is a violation of common law legal principles governing the corporate form, *not* a violation of anything contained in ERISA or an ERISA plan. Thus, Section 502(a)(3), which is directed narrowly at relief for ERISA violations, cannot apply.[3]

B. Federal Common Law.

1. Absent any express statutory cause of action to pierce the veil of an ERISA judgment debtor, this case can arise under ERISA only if the Court is willing to create a federal common law cause of action where ERISA does not.

This Court has considered and rejected the arguments for such a judicial rewriting of ERISA in *Mertens*. The Court refused "to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." 113 S. Ct. at

[3] *See Reich v. Rowe*, 20 F.3d 25, 29 (1st Cir. 1994) (interpreting similar language of Section 502(a)(5) of ERISA to limit available relief to redress of a violation of terms of ERISA).

2067 (internal quotations omitted); *see* Pet. Br. at 15-17; *see also United States v. Cordova Chem. Co.*, 59 F.3d 584, 590 (6th Cir. 1995) (rejecting a federal common law standard for piercing the corporate veil of a subsidiary to hold the parent liable as an "operator" under CERCLA; noting that Congress could have abandoned "traditional concepts of limited liability associated with the corporate form" had it chosen).

Mertens is squarely on point in its refusal to create an extrastatutory remedy for damages against a nonfiduciary. Moreover, it is the decisional principle of *Mertens*—that ERISA is a finished work, not merely a congressionally created scaffold on which the judiciary may mount whatever remedies it sees fit—that is crucial here. *Mertens* applies, and mandates reversal, because respondent seeks to assert under the rubric of ERISA a cause of action contained nowhere in ERISA.[4]

---

[4] Respondent's *amici* Central States (at 8-9) and NCCMP (at 13) refer to this Court's statement that "courts are to develop a federal common law of rights and obligations under ERISA-regulated plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (internal quotations omitted). The context of this statement, however, is that "ERISA abounds with the language and terminology of trust law," and accordingly that in construing ERISA the Court will be "guided by principles of trust law." 489 U.S. at 110-11.

There is a broad gulf between the principle stated in *Firestone*, that the common law understanding of trust law principles should be used in *interpreting* the text of ERISA, and the proposition advanced here and rejected in *Mertens*, that resort may be had to the common law to *create* an action that Congress declined to provide in enacting ERISA. *See Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 643-45 (1981) (power to interpret common law terms of Sherman Act does not give courts "the power to alter or supplement the remedies enacted"); *Buckley Dement, Inc. v. Travelers Plan Adm'rs*, 39 F.3d 784, 789-90 (7th Cir. 1994) (common law to be used in "implement[ing] the provisions of ERISA," not "augment[ing]" them). Moreover, veil piercing is not a trust law doctrine. *See Reich v. Compton*, 57 F.3d 270, 278 n.12 (3d Cir. 1995) (alter ego doctrine not part of the common law of trusts "upon which Congress engrafted ERISA" (citing *Firestone*); this "is not surprising given that the alter ego doctrine originally developed in the context of corporate law").

Faced with this controlling principle, those urging affirmance advance variations on the "more money" argument, *i.e.*, that the "purpose" of ERISA requires that every judicial decision must be tailored to maximize the recovery of ERISA claimants. *See, e.g.*, Resp. Br. at 15 (ERISA beneficiary "has a higher degree of expectation for recovery"); Bricklayers Br. at 16 (Congress has amended ERISA to give it "teeth" for recovery of delinquent contributions). This Court has flatly rejected that argument in *Mertens*, 113 S. Ct. at 2071, and in *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2055 (1994) ("there is no federal policy that the fund should always win"); *see* Pet. Br. at 16-17 & n.7.

2. Several *amici* representing multiemployer pension plans urge the Court to recognize a general federal common law of veil piercing under ERISA, because they are concerned about a different kind of case—one in which a multiemployer plan seeks to pierce the veil of a moribund corporation in order to have the corporation's alter ego declared the "employer" under Sections 3(5) and 515 of ERISA, 29 U.S.C. §§ 1002(5), 1145, for purposes of fulfilling contribution obligations to the plan. Rather than simply identifying this issue as one not presented here, these *amici* urge affirmance on the basis of an analogy between (a) the "employer contribution" scenario and (b) an attempt to pierce the veil of a breaching corporate fiduciary in order to declare the alter ego also to be a breaching *fiduciary*. *E.g.*, Bricklayers Br. at 12 & n.15; Central States Br. at 6, 9; NCCMP Br. at 15.[5]

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[5] Even in the employer contribution context, *amici* significantly overread certain decisions. *See, e.g., Massachusetts Laborers' Health & Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 26, 27 (1st Cir. 1988) (Breyer, J.) (panel bound by prior Circuit opinion in *Alman* regarding source of law; dealing in *dictum* with circumstance in which alter ego was "already obligated"; *i.e.*, was the alter ego at the time obligation was entered); *Connors v. P&M Coal Co.*, 801 F.2d 1373, 1378 (D.C. Cir. 1986) (joined by Ginsburg & Scalia, JJ.) (*dictum* noting other decisions; does not address federal common law issue).

Assuming *arguendo* that veil piercing is available in the employer contribution case, the proposed analogy collapses in this fiduciary liability case because of the difference between fiduciary liability for breach and employer liability for contributions. Fiduciary liability requires a finding that the fiduciary was guilty of some breach of duty—*while acting as a fiduciary*. Indeed, Section 409 of ERISA, which provides for fiduciary liability for breach of duty, expressly states that "[n]o fiduciary shall be liable with respect to a breach of fiduciary duty . . . if such breach was committed *before he became a fiduciary or after he ceased to be a fiduciary*." 29 U.S.C. § 1109(b) (emphasis added). If an individual meeting ERISA's functional definition of fiduciary—that is, having discretionary authority or control over a plan[6]—commits a breach, then there is fiduciary liability; the veil piercing inquiry can add nothing to the statutory test. If the aim of piercing the veil is to declare that the individual was a fiduciary at the time of the wrong, then the proper and only inquiry is the statutory test of whether the individual exercised discretionary authority or control. If so, the individual is a fiduciary regardless of corporate form. Pet. Br. at 18-19. On the other hand, if the purpose of the veil piercing inquiry is, as appears to be the case here, to declare that the individual *later* became a fiduciary and is therefore responsible for a *prior* ERISA wrong, then liability is precluded by Section 409(b) of ERISA. In either event, veil piercing has no place in the fiduciary liability analysis.

Petitioner was conclusively adjudged *not* to be a fiduciary of the Tru-Tech plan at the time of the breach of fiduciary duty that supports the *Tru-Tech* judgment. *See* U.S. Br. at 25 (petitioner's liability "was not premised on" ERISA violation). Further, it is universally acknowledged that the events alleged to support veil piercing here occurred after the fiduciary breach. Thus, pursuant to

[6] As *Mertens* points out, this definition expands beyond the common law "the universe of persons subject to fiduciary duties—and to damages." 113 S. Ct. at 2071.

ERISA Section 409(b), the one thing that this case absolutely cannot be about—and the misplaced focus of the *amici* multiemployer plans—is whether Tru-Tech's corporate veil can be pierced to make petitioner a fiduciary with respect to the breach in this case. *See* Central States Br. at 6.

3. From the foregoing, it is clear that respondent has no cause of action, either express or implied, arising under ERISA. The only remaining argument for application of federal law in this case is that the statute should be supplemented by creation of a federal common law rule of decision for imposition of liability on persons claimed to be the alter ego of a federal judgment debtor.[7]

In a word, *O'Melveny* is dispositive. There, the FDIC sought application of a federal common law rule of decision in a professional negligence and breach of fiduciary duty case brought against a law firm that had represented a failed bank. This Court held that state law governed, noting that it would not "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed," 114 S. Ct. at 2054, and that even in the absence of such a comprehensive statutory framework, no federal rule of decision would be adopted in the absence of "a significant conflict between some federal policy or interest and the use of state law," *id.* at 2055 (internal quotation omitted).

First, ERISA is precisely the kind of "comprehensive and detailed" statute that calls for no judicial additions. The lack of need for federal common law accretions is especially clear with respect to ERISA because of its express preemption provision. When a matter, such as this one, is plainly beyond the reach of a preemption provision, the lack of federal interest in imposng a common law rule of decision becomes even clearer. Pet. Br. at 21-24; *see Mackey v. Lanier Collection Agency & Serv.*,

[7] The United States does not join those seeking federalization of this corporate law doctrine. U.S. Br. at 25.

486 U.S. 825, 834 (1988) (leaving "state-law methods for collecting money judgments . . . undisturbed by ERISA").

Nor is there any "significant conflict" here between federal policy and state law principles. There is no suggestion that some states do not recognize veil piercing (or provide for the voiding of preferential transfers, the more appropriate remedy here). *See Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977) (declining to "federalize" state corporate law "[a]bsent a clear indication of congressional intent"; noting the general understanding that state law will govern corporate affairs unless "federal law *expressly*" states to contrary).[8]

The Fourth Circuit clearly erred in imposing liability on petitioner on the basis of a "liberal [federal common law] veil-piercing standard" created especially "for use in ERISA actions." Pet. App. 23a. Even if this Court concludes that this action is properly within the federal courts' ancillary jurisdiction, the matter will have to be remanded for proper application of a state law rule of

[8] Incredibly, three *amici* ask this Court to create a federal common law rule of veil piercing for *every* attempt to collect a federal judgment. Bricklayers Br. at 11 (championing the "universally recognized federal veil piercing doctrine"); NCCMP Br. at 11-12 (urging veil piercing in every case "where a federal judgment is sought to be enforced"); Central States Br. at 9-10 ("[v]eil piercing is a federal common law matter where the liability of the corporation is created by federal statute"). These *amici* mischaracterize *Anderson v. Abbott*, 321 U.S. 349 (1944), a narrow preemption case. In *Anderson*, the National Bank Act itself expressly pierced the corporate veil and made shareholders of national banks directly liable for certain debts. 321 U.S. at 369 n.1 (quoting statute). The Court held a Delaware statute preempted that allowed evasion of the federal statute by the simple interposition of a holding company owning all the stock of the national bank, with the holding company's shareholders having limited liability. *Id.* at 365. The *Anderson* court expressly noted the narrowness of its holding: "*Barring conflicting federal incorporation statutes*, Delaware may choose such rules of limitation on the liability of stockholders of her corporations as she desires." *Id.* (emphasis added). Of course, there is no federal incorporation statute at issue here.

decision on the merits, and proper determination of personal jurisdiction. *See supra* note 1.[9]

II. THERE IS NEITHER A CONSTITUTIONAL BASIS NOR A POLICY JUSTIFICATION FOR ANCILLARY JURISDICTION OVER THIS STATE LAW MATTER.

1. Respondent and several *amici* ask this Court to hold that any action, the goal of which is to obtain assets for a holder of a federal judgment, is itself a federal action. The incredible breadth of this "asset-finding" jurisdiction is in sharp contrast to this Court's prior decisions, which clearly delineate the limited circumstances in which a matter that shares no common nucleus of operative fact with a federal action can nevertheless be called part of the same constitutional "case." Under these decisions, a plaintiff can bring such an action in federal court only when (a) the *res* that is the subject of the lawsuit has been attached or is otherwise in the actual or

[9] The rule adopted below also departs from black letter principles of veil piercing law, both (i) in imposing liability on petitioner for wrongs that occurred before he was alleged to be Tru-Tech's alter ego, *see* Pet. Br. 26 n.16; 1 Fletcher § 43.10 ("control must . . . have been exercised at the time the acts complained of took place": control "must proximately cause the injury"), and (ii) in allowing recovery beyond the amount of the allegedly improper transfers, 1 Fletcher § 45 (where transfers "may be avoided as fraudulent conveyances, disregard of the corporate entity is unnecessary").

In light of this inconsistency with general principles of veil piercing law, the Fourth Circuit's brief *dictum* that the rule in this case "accords with [its] understanding" of South Carolina law, Pet. App. 22a n.16, cannot forestall a more searching inquiry into the appropriate state law remedy. *See Miree v. DeKalb County*, 433 U.S. 25, 33 (1977) (where court of appeals incorrectly disposed of case by creating federal common law, remanding to apply state law and reexamine prior *dicta* concerning state law). First, it is not clear that South Carolina law would govern here. In any event, as the Government notes, there does not appear to be South Carolina authority on the limitation of the veil-piercing remedy when it is based on preferential transfers, U.S. Br. at 27 n.19; nor are we aware of South Carolina authority that an alter ego may be made liable for acts occurring before the veil could be pierced. These state law questions should be certified to the appropriate state court on remand, if remand is necessary.

constructive possession of the court (a situation not presented here), or (b) the second action involves a matter already litigated by the parties (or their privies) and embodied in an order of the court. *See infra* pp. 12-16. If the line is not drawn at the boundaries of the terms of the court's prior order, there is no principled place at which it can be drawn.[10] Under respondent's proposed rule, "the post-judgment pursuit of a questionable gambling debt allegedly due the defendant," *Skevofilax v. Quigley*, 810 F.2d 378, 389 (3d Cir. 1987) (*en banc*) (Becker, J., concurring), would be ancillary.

This line is reinforced by this Court's numerous admonitions that ancillary jurisdiction may be exercised only if it is "necessary" or "essential" to protection of the federal court's existing federal question or diversity jurisdiction. *See Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1673, 1677 (1994) (matter must be "essential to the conduct of federal-court business"); Pet. Br. at 36. When the putatively ancillary matter does not involve rights to a *res* in the hands of the court, and cannot be resolved by reference to what the federal court has already decided (so that decision of the matter cannot be said to threaten to undermine the court's prior decision), then resolution of the new matter by the federal court cannot be said to be "necessary." In a *Kokkonen*-type situation, for instance, it could easily be argued that the flouting of a settlement agreement entered for the express purpose of obtaining dismissal of a federal action is an affront to the dignity and functioning of the court,

[10] Respondent and his *amici*, as did the Fourth Circuit, rely on the proposition that an attempt to pierce the corporate veil is "subsidiary to some primary cause of action" to suggest that a veil-piercing claim must always be ancillary. Pet. App. 12a, 16a; *see* Resp. Br. at 8. The conclusion does not follow. Veil piercing is "subsidiary" in the limited sense that liability does not flow simply because the veil can be pierced; there must be an independent wrong, and the alter ego must have responsibility for that wrong. *See supra* note 9. This concept has nothing to do with ancillary jurisdiction, especially here, where there is no claim that the veil piercing has any factual connection to the prior wrong.

undermining its authority and the "spirit" of its order. *Kokkonen* makes clear, however, that this sort of activity beyond the scope of a federal court order, even if inconsistent with the spirit of that order, is not enough for ancillary jurisdiction. As this Court's prior decisions demonstrate, it is not "necessary" for the federal court to take up the matter unless property in its possession, or the express terms of its order, are at issue. *See Owen Equip. & Erec. Co. v. Kroger*, 437 U.S. 365, 377 (1978) ("neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction").

The *Tru-Tech* order did not attach Tru-Tech's assets, and petitioner was not held liable here for violating the terms of the *Tru-Tech* order. The common law of veil piercing, not the terms of the *Tru-Tech* order, supplied the controlling legal principle below. It was thus not "essential" to vindication of the *Tru-Tech* order that this new allegation, involving facts never before presented, and a new trial, be heard in federal court.[11]

2. Neither respondent nor any *amicus* contends that federal court jurisdiction can be premised here on the familiar common nucleus of operative fact test.[12] Nor is

[11] We emphasize that we are not contending that there is no remedy for the wrong alleged here. The point here is that Article III places a limit on the ability of the federal courts to hear all claims that come before them.

[12] This distinguishes *Dewey v. West Fairmont Gas Coal Co.*, 123 U.S. 329 (1887). There, a defendant brought a counterclaim for a fraudulent transfer against both a diverse plaintiff and a non-diverse third party. *Id.* at 331-32. The fraudulent transfer claim against the third party was of course factually interdependent with the identical counterclaim against the plaintiff, who was still before the court and over whom there was proper jurisdiction.

The fact that *Dewey* involved a counterclaim is also critical. As this Court has noted, ancillary jurisdiction "has often been upheld in situations involving impleader, cross-claims or counterclaims," since ancillary jurisdiction serves there to allow to be heard "claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could

this a case in which the property at issue has been attached or otherwise placed in the court's possession. Although the Government cites these latter cases, they are readily distinguishable. As the Government acknowledges, their *in rem* character justifies ancillary jurisdiction over the parties and disputes surrounding the *res*, since the alternative would be to leave claimants not before the court without an effective remedy. U.S. Br. at 14 & n.7.[13] *See Finley v. United States*, 490 U.S. 545, 551 (1989) (ancillary jurisdiction available "when an additional party has a claim upon contested assets within the court's exclusive control"). Of course, affirmance of the Fourth Circuit would sweep away the carefully drawn distinctions in this line of cases; there will never again be a need for execution or attachment in federal court if any party receiving unattached property claimed by a judgment debtor can be haled into court on that basis alone.

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assert them in an ongoing action in a federal court." *Owen*, 437 U.S. at 375-76; *see also Dery v. Wyer*, 265 F.2d 804, 807 n.3 (2d Cir. 1959) (characterizing *Dewey* as involving a compulsory counterclaim). Plainly, if *Dewey* had involved an attempt by a *plaintiff* to assert ancillary jurisdiction over a third party not otherwise before the court, the attempt would have failed under the doctrine of *Owen*, which refused to allow a plaintiff, after a non-diverse third-party defendant was added by the defendant, to assert a factually related claim against that third-party defendant.

[13] *See Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 693 (1950) (in admiralty, federal court has jurisdiction to determine "[d]isputes over ownership of attached vessels" to ensure propriety of attachment); *Alexander v. Hillman*, 296 U.S. 222, 237-38 (1935) (in a receivership, receivers "may sue to recover any part of the res"; the issue before the Court in this case was in any event *personal* jurisdiction, not subject matter, *id.* at 231, 242; the Court also remarked on the existence of common issues of fact, *id.* at 243); *Krippendorf v. Hyde*, 110 U.S. 276, 280-86 (1884) (party claiming to own property attached in federal court proceeding may assert title in that proceeding; noting that attached property "is regarded as in the custody of the court"); *Minnesota Co. v. St. Paul Co.*, 69 U.S. (2 Wall.) 609, 632 (1864) (if property is "in the hands of the receiver of the Circuit Court, nothing can be plainer than that any litigation for its possession must take place in that court, without regard to the citizenship of the parties").

Indeed, the availability of *in rem* ancillary jurisdiction underscores, in two ways, that the instant action is not properly regarded as ancillary. First, *Kokkonen* emphasizes that ancillary jurisdiction is improper when the court and the parties could have provided in the original order for a broader retention of jurisdiction. 114 S. Ct. at 1677. Here, no asset of Tru-Tech was attached.

Second, respondent had the option of instituting an involuntary bankruptcy proceeding (an *in rem* proceeding) against Tru-Tech *after* respondent discovered the allegedly improper transfers. *See* 11 U.S.C. § 303. Even if one assumes *arguendo* that state court proceedings are somehow inadequate, bankruptcy offers a congressionally created federal court proceeding to protect creditors such as respondent against improper transfers. *See id.* §§ 541-544, 547. Of course, bankruptcy law also provides protections for *other* creditors against preferential treatment of one creditor, such as respondent, including rules governing notice and distribution of assets. *See id.* §§ 342, 507, 726. These protections are not part of the *ad hoc*, judicially created ancillary remedy sought by respondent.[14]

3. Federal court ancillary jurisdiction could be justified here only if it were necessary to protect the court's prior judgment. This Court's cases make it clear that the federal court's role in protecting a judgment is coterminous with the terms of that judgment; if the putatively ancillary proceeding seeks a result or relief different from what is provided in the main case, the second proceeding is not merely an extension of the same constitutional case, but requires its own jurisdictional basis. *See Dugas v. American Surety Co.*, 300 U.S. 414, 428 (1937) (jurisdiction to enforce prior decree is available *if* "the relief be not of a different kind or on a different principle"); *see also* Pet. Br. at 39. This case, with new

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[14] Respondent's claim constituted only about 15 percent of Tru-Tech's total indebtedness. C.A. 4 App. at 162-63. Of Tru-Tech's remaining creditors, petitioner, who was personally owed $344,000 by Tru-Tech, was among the largest. *Id.* at 162.

parties and new matters necessitating a new trial, plainly goes beyond enforcing the terms of the *Tru-Tech* judgment. *See Berry v. Lemore*, 195 F.2d 452, 455 (5th Cir. 1986) ("We can find no case where a court held it had ancillary jurisdiction to consider claims in a *new and independent action* merely because the second action sought to satisfy or give additional meaning to an earlier judgment.").

The cases relied on by respondent and his *amici* (other than the factual interdependence and *in rem* cases discussed *supra*) amount to nothing more than application of principles of *res judicata* against parties to the prior action or their privies. As this Court has noted, ancillary jurisdiction exists "to avoid the relitigation of questions once settled between the same parties." *Root v. Woolworth*, 150 U.S. 401, 410-11 (1893).[15]

For instance, in *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934), a case relied on heavily by the Government, the respondent had received a discharge in bankruptcy of all debts, including the one owed the petitioner. The petitioner, as a creditor with notice, was thus bound as a party under *res judicata* principles. *See, e.g., Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375 (1940). The petitioner nevertheless brought a

[15] The Anti-Injunction Act, 28 U.S.C. § 2283, which generally prohibits interference in state court proceedings by federal courts, contains a "relitigation exception" that allows stay of a state court proceeding "to protect or effectuate" federal court judgments —the language used to describe the scope of ancillary jurisdiction. *See Dugas*, 300 U.S. at 428 (ancillary bill may be brought "in aid of and to effectuate" prior federal decree); *Kokkonen*, 114 S. Ct. at 1676 (court has "power to protect its proceedings and vindicate its authority"). The "protect or effectuate" language, which has been construed as "essentially a res judicata concept designed to prevent" relitigation, *Wesch v. Folsom*, 6 F.3d 1465, 1471 (11th Cir. 1993), will justify federal injunction of a state proceeding only where the "federal court's flexibility and authority to decide" the case is "seriously impair[ed]." *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986). This line of authority supports limiting ancilliary jurisdiction to matters falling within the bounds of prior court orders.

post-discharge action in state court to enforce an assignment of wages given to secure the debt. *Local Loan* holds that there is ancillary jurisdiction over the respondent's subsequent proceeding seeking, *on the basis that the debt had already been discharged by the federal court*, to enjoin the petitioner's state court suit. 292 U.S. at 238-39.

Dugas is to similar effect. There, a surety availed itself of the federal Interpleader Act in order to satisfy claims lodged against it in excess of its bonding obligation. After the federal court entered its order extinguishing the claims, claimant Dugas pursued a state court action to collect additional money from the surety. This Court affirmed jurisdiction over the surety's supplemental bill seeking to enjoin Dugas from further pursuing the state court action. In so doing, the Court was careful to emphasize that Dugas' actions were in direct contravention of the court's decrees. 300 U.S. at 426-27. A federal court has jurisdiction to see that its decrees are given effect, "*but subject to the qualification* that the relief be not of a different kind or on a different principle." 300 U.S. at 428 (emphasis added). *See also Riverdale Cotton Mills v. Alabama & Ga. Mfg. Co.*, 198 U.S. 188, 195 (1905); *Minnesota Co.*, 69 U.S. at 632.

The rulings in *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166 (1868) and *Labette County Commissioners v. United States ex rel. Moulton*, 112 U.S. 217 (1884), are not to the contrary. Each case involved municipal liability on bonds, adjudicated in federal court. The subsequent proceedings were brought, not to establish the liability of a different party for those judgments, but simply to order persons, *in their official capacities*, to cause the judgments to be satisfied.[16] In this sense, the

[16] It did not matter that the bonds in *Labette County* were those of a township, while the enforcement order was directed to county officials. The township bonds were issued by the county commissioners and, pursuant to state law, it was the county commissioners who had the authority to levy the tax to pay those bonds. *See* 112 U.S. at 218, 222. The Court properly emphasized that the county

orders in question are simply "a substitute for the ordinary process of execution to enforce the payment" of the judgment against the original defendant. *Riggs*, 73 U.S. at 198. Because these were actions against county officers in their official capacities, "the real party in interest . . . is the entity represented and not the individual officeholder." *Karcher v. May*, 484 U.S. 72, 78 (1987). Here, by contrast, petitioner was sued in his *individual* capacity for *personal* liability and the judgment against him is not the mere application of *res judicata*.[17]

The action here is not one seeking merely to enforce or to avoid relitigation of matters already decided by the court. As respondent puts it, this is an action "to *establish liability* on the part of" petitioner. Resp. Br. at 4. That does not describe *Riggs* or *Labette*, or any of this Court's other ancillary jurisdiction cases. It does describe the universal understanding of a separate constitutional "case," one that must have its own jurisdictional basis.

4. This is the conclusion reached by this Court in *H.C. Cook Co. v. Beecher*, 217 U.S. 497 (1910). *Beecher* confirms that ancillary jurisdiction stops short of separate lawsuits, involving new facts and claims, brought to impose liability on a third party. *See* Pet. Br. at 29-31.[18]

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commissioners "are not strangers" to the judgment, "but are bound by it, *as it stands*." *Id.* at 221 (emphasis added).

[17] To the contrary, this Court has held that a judgment's *res judicata* effect cannot be applied to a non-party to the initial action who is alleged to be an alter ego, until that non-party, in a second action, is found after a new trial in fact to be an alter ego. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 111 (1969). *Zenith*, and common sense, thus refute the Government's argument that an action to establish the alter ego status of a non-party is merely an action to execute the judgment. *See* U.S. Br. at 12. Accordingly, Fed. R. Civ. P. 69(a) is irrelevant. *See also* Fed. R. Civ. P. 82 ("These rules shall not be construed to extend . . . the jurisdiction of the United States district courts").

[18] The United States, U.S. Br. at 12, relies on *Alexander v. Hillman* in criticizing the argument that this lawsuit is a new "case" because it involved new parties, new facts, a new caption,

Faced with the intractable likeness of *Beecher* to this case, the United States suggests that the holding in *Beecher* that the second suit was not ancillary to the first is "best regarded as dictum." U.S. Br. at 21. The Government goes on to suggest that the claim in *Beecher* was "truly independent," and thus not ancillary, on the theory that it stated "a pure state law claim." *Id.* at 22-23.

Neither posited distinction withstands scrutiny. First, *Beecher* plainly is an ancillary jurisdiction case. The circuit court's decision was based squarely on the lack of jurisdiction, and that court ruled directly that there was no ancillary jurisdiction. *H.C. Cook Co. v. Beecher*, 172 F. 166, 167 (C.C.D. Conn 1909) This Court agreed with the circuit court that the suit had to be viewed as "an attempt to make the defendants answerable for the [federal court] judgment already obtained," and affirmed the ruling that such a matter belonged in state court, not federal court. 217 U.S. at 498. This holding cannot be squared with the ruling below that this attempt to make petitioner liable for "the judgment already obtained" can be maintained in federal court.

As to the second proffered distinction of *Beecher*, there is no more or less "a pure state law claim," U.S. Br. at 23, here than there was in *Beecher*. The Government argues that the claim against petitioner was not "pure" (the Government *does* view it as a state law claim, U.S. Br. at 25) because it is premised on a "scheme" to defeat a federal judgment. We submit the availability of federal jurisdiction over a state-law tort action should not turn on whether the complaint alleges that the tort was com-

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and a new complaint. We submit that Article III's definition of "case" must be understood at least in part in terms of the common understanding of the term "case"—that is, a discrete lawsuit begun with a summons and complaint to resolve a circumscribed dispute. *Hillman* supports this view. There, this Court based its conclusion that the ancillary bill did not commence a new suit on the "fact that process was not prayed or issued." 296 U.S. at 239. What the United States calls "notions of formal pleading" are actually reflections of the natural meaning of the word "case."

mitted with one eye on a federal judgment. Moreover, this proposed standard does not distinguish *Beecher*. The defendants there were accused, as is petitioner here, of carrying out a course of action with the knowledge that it would deplete the assets of the corporation and render any judgment rendered against the corporation uncollectible. 217 U.S. at 498.[19] The thrust of these allegations is made particularly plain by reference to the brief filed with this Court by the Plaintiff in Error in *Beecher*. At pages 8-10, the Plaintiff in Error argues that the directors set out to make as much money as they could off the alleged infringement during the pendency of the suit, to pay that money out of the corporation, and to leave the corporation unable to respond to a judgment.[20]

5. The United States agrees with us that congressional intent is relevant "to the scope and proper exercise of a court's ancillary jurisdiction." U.S. Br. at 19. The Government, however, argues that the breadth of ERISA implies that the federal courts should be commensurately expansive in asserting ancillary jurisdiction over actions purporting to collect ERISA judgments.

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[19] For this reason, the distinction of *Beecher* suggested by *amicus* AFL-CIO—that *Beecher* is different because it involves pre-judgment conduct only—plainly fails. *See* AFL-CIO Br. at 11-12 (suggesting distinction and then admitting its meaninglessness). If anything, the behavior in *Beecher* would be more amenable to ancillary jurisdiction than the allegations here, because the conduct in *Beecher* took place while the underlying matter was actually before the court.

[20] The United States also points to *Empire Lighting Fixture Co. v. Practical Lighting Fixture Co.*, 20 F.2d 295 (2d Cir. 1927) in attempting to distinguish *Beecher*. The result in *Empire Lighting*, and hence its distinction of *Beecher*, turns on a peculiarity of New York law. As *Empire Lighting* explains, a fraudulent conveyance is *void* under New York law, with the result that a suit to set it aside is "not therefore essential," and can therefore be regarded as "in substance an equitable execution" against the debtor itself. 20 F.2d at 296-97; *see J.M. Resources Inc. v. Petro-Pak Resources, Ltd.*, 581 F. Supp. 629, 633 (D. Colo. 1984) (denying jurisdiction and distinguishing *Empire Lighting* on grounds that it reads New York law to regard the debtor as "still own[ing] the property").

This Court's decisions establish the opposite—that the breadth of ERISA counsels against judicial expansion. This Court's cases have repeatedly made clear that where Congress has set out to supply comprehensive regulation of an area of law, the judicial assumption is that Congress has accomplished all that it set out to do, and *not* that sweeping congressional action is an invitation to the courts to try their own hands at further regulation. *Mertens*, 113 S. Ct. at 2071; *O'Melveny*, 114 S. Ct. at 2054. It is particularly inappropriate to expand jurisdiction to new parties that Congress chose not to reach. *See Finley*, 490 U.S. at 549 ("with respect to the addition of parties," the Court "will not read jurisdictional statutes broadly").

6. Respondent and his *amici* do not disagree that prudential concerns may limit the exercise of ancillary jurisdiction. *See* Pet. Br. at 42-43. Rather, the United States appears to take the extraordinary position that it is the district courts alone that have the role of setting those prudential limits, on a case-by-case basis. U.S. Br. at 18-19.

That position is contrary to this Court's holdings in standing and ripeness cases, where the Court itself has set and applied prudential limits. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 474-75 (1982); *see also Local Loan*, 292 U.S. at 241 (describing circumstances under which federal court, with power to hear ancillary proceeding, should nonetheless decline). Recognizing ancillary jurisdiction in this case would, as several *amici* concede, open the doors of the federal courts to all manner of actions "to identify . . . those parties who are liable," Pet. App. 13a, and to reach their assets for satisfaction of *all* federal judgments. *See, e.g.*, AFL-CIO Br. at 2; AARP Br. at 11 n.6, 15 ("it makes no difference under what federal statute the judgment was adjudicated"). These asset finding actions will invariably involve not only new parties but new theories of liability, and require a new trial, as happened here. *See, e.g.*,

Zenith Corp., 395 U.S. at 111 (determination of alter ego status requires new trial).

Furthermore, the volume of *amici* urging this Court to approve of federal "asset-finding" jurisdiction is itself sufficient to show that these matters would likely impose a substantial burden on federal court dockets. "Asset-finding" forays against third parties by federal judgment creditors—in diversity as well as federal question cases, for there is no principled basis for distinguishing among types of federal judgments for purposes of ancillary jurisdiction—could rest on a wide variety of state law theories, and they might easily be instituted years after the primary action. Moreover, these cases would require the federal courts to determine what notice, intervention, and distribution mechanisms to create in order to protect the claims of *other* creditors to the same disputed assets. *See, e.g., Krippendorf*, 110 U.S. at 281-86 (noting necessity of allowing intervention by third party with asserted interest in property). Federal court jurisdiction over such actions is neither "necessary nor even particularly efficient." *Kokkonen*, 114 S. Ct. at 1676.

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

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D. GRANT PEACOCK, PETITIONER

v.

JACK L. THOMAS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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37 pp

QUESTIONS PRESENTED

1. Whether, in a case arising under federal law, a district court has ancillary jurisdiction in a post-judgment proceeding to disregard the separate legal personality of a corporate judgment debtor and impose personal liability on a controlling shareholder who has siphoned the corporation's assets in order to frustrate collection of the judgment.

2. Whether the Employee Retirement Income Security Act of 1974 (ERISA) prohibits a district court from piercing the veil of a corporation found liable for violating ERISA, to impose liability for the judgment on a shareholder who gained control of the corporation after the violation, and used that control to siphon the corporation's assets and thereby frustrate collection of the judgment.

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INTEREST OF THE UNITED STATES

The Secretary of Labor, who administers and enforces Title I of the Employee Retirement Income Security Act of 1974 (ERISA), see 29 U.S.C. 1002(13), 1132, 1136(b) (1988 & Supp. V 1993), has a strong interest in ensuring the enforceability of ERISA judgments.

STATEMENT

1. In 1981, petitioner and several co-investors formed Tru-Tech, Inc., to acquire a textile machinery parts business from Rockwell International Corporation. Pet. App. 4a. Tru-Tech's headquarters were established in Spartanburg, South Carolina, and it had plants in that State and in New Hampshire. *Id.* at 31a-32a. In December 1981, the board of directors adopted a pension plan for Tru-Tech's salaried workers. J.A. 4-5, 34.

Tru-Tech soon ran into financial difficulties, however, and it ultimately failed. Pet. App. 5a-6a. In 1985, the company closed its headquarters in Spartanburg, and relocated to space in Pittsburgh, Pennsylvania, that it shared with Peacock, Williams & Company (PWC), a management firm wholly owned by petitioner. *Id.* at 4a-5a, 32a-33a. Around that time, Tru-Tech terminated the pension plan and obtained a reversion of the plan's assets, on the rationale that the plan had been denied tax-qualification by the IRS and, therefore, the participants had obtained no vested rights to benefits. J.A. 35; Pet. App. 56a. In July 1986, Tru-Tech's president was placed on PWC's payroll for the purpose of "wrapping-up Tru-Tech's affairs." *Id.* at 6a-7a.

As Tru-Tech's fortunes declined, petitioner bought out several of his co-investors; by 1987, he owned more than 70% of the company's stock. Pet. App. 6a. From November 1986 until Tru-Tech's dissolution in May 1990, there was substantial intermingling of the funds and personnel of Tru-Tech and PWC, and a general failure to observe corporate formalities among Tru-Tech, petitioner, and PWC. *Id.* at 40a-42a. Petitioner and his employees at PWC were the only functioning Tru-Tech officers and directors, and the company ceased keeping regular accounting or corporate records. *Id.* at 34a, 40a. After March 1988, petitioner—by then Tru-Tech's sole director—ran the company from his office in Pittsburgh, personally directing the disposition of its assets and controlling its financial affairs. *Id.* at 40a.

2. In August 1987, respondent filed suit in the United States District Court for the District of South Carolina, in his individual capacity, on behalf of the pension plan, and as a representative of the class of plan participants, alleging that Tru-Tech, petitioner, and PWC had breached their fiduciary duties under ERISA. Pet. App. 30a; J.A. 35-36. On November 28, 1988, after a bench trial, the

district court found that the pension plan had been approved and qualified by the IRS, thereby vesting the participants' benefits; that Tru-Tech's board of directors later attempted to amend the plan to induce the IRS to issue an adverse determination; that the attempted amendment was invalid; and that the subsequent appropriation of plan assets by Tru-Tech constituted a breach of its fiduciary duties, in violation on 29 U.S.C. 1104(a). See J.A. 18-26, 35-36. The court entered judgment against Tru-Tech in the amount of $187,628.93, plus interest. J.A. 27, 36. It concluded, however, that neither petitioner nor PWC exercised sufficient discretionary authority or control over the administration of the plan, or the disposition of its assets, to make either liable as a plan fiduciary. J.A. 24-25, 36. In April 1990, the court of appeals affirmed. J.A. 33-42.

3. In March 1989, petitioner decided that Tru-Tech would "refrain, for the time being, from payment of any obligations arising out of" the litigation, and instead "use * * * its receivables [to] pay the amounts owed to [PWC] and to [petitioner], personally." Pet. App. 35a. Despite Tru-Tech's insolvency, petitioner transferred from Tru-Tech to PWC and other favored creditors cash, notes and receivables valued at more than $80,000. *Id.* at 8a-10a, 35a-42a. The bulk of the transfers to PWC were made ostensibly in consideration of "financial consulting services" and office space provided by PWC. *Id.* at 6a, 41a.

After the Fourth Circuit affirmed, respondent attempted, unsuccessfully, to collect on the judgment in Pennsylvania state court. Pet. App. 4a. Petitioner's counsel stated, in response to interrogatories, that Tru-Tech was "defunct," and that "there is no one known to [petitioner] or to me who has the authority and knowledge to prepare the answers." *Id.* at 10a.

4. In December 1991, respondent returned to the United States District Court for the District of South Carolina and, on behalf of the pension plan and the plaintiff class, filed a complaint against petitioner and his counsel. Pet. App. 4a; see also J.A. 44-51 (First Amended Complaint). Respondent alleged that Tru-Tech was merely petitioner's "instrumentality," J.A. 49-50; that the 1988 judgment remained unsatisfied, J.A. 45; and that petitioner had "caused and directed the appropriate officers of Tru-Tech, Inc., to make specific transfers of assets to preferred creditors and to squander and waste the assets of the corporation so as to specifically prevent collection of [respondent's] judgment," J.A. 48. Respondent claimed that petitioner's direct control over Tru-Tech's affairs and fraudulent siphoning of the company's assets justified (under ERISA and other applicable federal law) piercing the company's corporate veil and holding petitioner personally liable for the 1988 judgment. J.A. 49.

The district court viewed respondent's suit as "an attempt to satisfy a former judgment properly rendered." Pet. App. 57a. It found that, since November 1986, "the corporate shell of Tru-Tech [had served] merely [as] a facade for the operation of the dominant will of [petitioner]," *id.* at 40a, and that petitioner had directed the management of Tru-Tech's affairs to "siphon off" corporate assets, with a "specific intent * * * to defraud the former employees of Tru-Tech who were beneficiaries of the Pension Plan and to defeat their legitimate attempt to collect a lawful judgment," *id.* at 42a. Relying primarily on cases imposing alter-ego liability under ERISA, but looking also to South Carolina and general federal common law, the court held petitioner personally liable for the 1988 judgment. *Id.* at 43a-51a, 53a.

5. The court of appeals affirmed petitioner's liability for the 1988 judgment. Pet. App. 1a-29a. It rejected petitioner's argument that, because the action was merely one to collect a judgment, the district court lacked subject matter jurisdiction. *Id.* at 11a, 12a. The court relied on "black letter law that 'the jurisdiction of a court * * * continues until [its] judgment [is] satisfied.'" *Id.* at 12a-13a (quoting *Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166, 187 (1868)). It explained that, "[b]ecause identification of those parties who are liable is necessarily antecedent to procedural enforcement of the judgment," the veil-piercing determination falls within a court's ancillary jurisdiction. Pet. App. 13a. The court deemed it irrelevant that respondent had filed a separate action to pierce Tru-Tech's corporate veil, observing that subject matter jurisdiction does not turn on whether respondent "pursued the procedurally proper route." *Id.* at 16a.[1]

The court also rejected the notion that ERISA itself precludes piercing the veil of a corporation found liable for violating the Act. The court acknowledged this Court's statement in *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 833 (1988), that "ERISA does not provide an enforcement mechanism for collecting judgments," but observed that "the mere fact that ERISA may not provide an explicit mechanism for judgment enforcement does not mean that ERISA may not provide *jurisdiction* for judgment enforcement." Pet. App. 18a. The court

[1] The court distinguished *H.C. Cook Co.* v. *Beecher*, 217 U.S. 497 (1910), in which the Court stated that a suit to hold corporate directors liable as joint tortfeasors for a patent infringement judgment entered against the corporation was not an ancillary action. It observed that the directors in *Beecher* had acted within their legal capacities in voting to continue sales of the allegedly infringing product during the pendency of the prior suit, while in this case petitioner "deliberately engaged in improper transfers and improperly ignored corporate formalities" to evade an already existing judgment. Pet. App. 15a. Here, the court concluded, unlike in *Beecher*, the subsequent action was not "truly 'independent' of the former action and judgment." *Ibid.*

found similarly unavailing petitioner's reliance on *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063 (1993). It explained that, while *Mertens* held that ERISA provides no action for money damages against nonfiduciaries, this suit is not an independent action against a nonfiduciary, but an "equitable attempt to satisfy a previous judgment entered against a fiduciary." Pet. App. 19a. The court found no contradiction between the district court's finding of alter-ego liability and its earlier determination that petitioner was not a plan fiduciary. *Id.* at 19a n.14. The tests for fiduciary liability and veil piercing are different, the court noted, and in this case most of the activity giving rise to veil piercing occurred after the corporation's breach of its fiduciary duties. *Ibid.*

Finally, the court rejected petitioner's argument that *Mackey* compelled use of a state law veil-piercing standard. Pet. App. 20a. That would be true, the court stated, if veil piercing were "merely an enforcement mechanism for collecting a judgment." *Ibid.* But, viewing veil piercing as a substantive doctrine that "determines *who* is liable for breaches of ERISA fiduciary duties," the court concluded that "ERISA preempts any state law of veil-piercing." *Ibid.* The court noted, however, that the federal common law standard it applied was consistent "with [its] understanding of the South Carolina rule." *Id.* at 22a n.16.

On the merits, the court sustained as not clearly erroneous the district court's findings of fact, and affirmed its determination that the facts warranted holding petitioner liable for the 1988 judgment. Pet. App. 24a.

SUMMARY OF ARGUMENT

I. Although petitioner portrays this case as an independent action, it is more accurately characterized as a proceeding to prevent the frustration of an existing

judgment. This Court has long recognized that federal courts have jurisdiction to issue orders necessary or appropriate to effectuate their judgments. Thus, for example, this Court has affirmed the exercise of ancillary jurisdiction over contested attachment, garnishment, and fraudulent conveyance proceedings initiated to enforce, or permit the enforcement of, federal judgments. The application of the alter-ego doctrine to hold liable a controlling shareholder who has acted purposely to frustrate collection from a corporate judgment debtor falls securely within this Court's settled precedents.

II. Nothing in ERISA prohibits a federal court from piercing the veil of a corporation found liable for violating the Act, to impose liability for the judgment on a shareholder who gained control of the corporation after the violation and used that control to frustrate collection of the judgment. ERISA itself provides no mechanism for the collection of judgments, and, in the absence of an express statement in the Act precluding an otherwise appropriate enforcement practice (and petitioner points to none here), there is no reason to conclude that the practice is preempted or otherwise disallowed by ERISA.

ARGUMENT

I. A FEDERAL COURT HAS JURISDICTION IN POST-JUDGMENT PROCEEDINGS TO PIERCE THE VEIL OF A CORPORATE JUDGMENT DEBTOR AND HOLD LIABLE A CONTROLLING SHAREHOLDER WHO TOOK STEPS TO DEFEAT COLLECTION OF THE JUDGMENT

1. The jurisdiction of the federal courts extends to "matters (otherwise beyond their competence) that are incidental to other matters properly before them." *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 114 S. Ct. 1673, 1676 (1994). That incidental, or "ancillary," jurisdiction

encompasses at its core a court's power "to manage its proceedings, vindicate its authority, and effectuate its decrees." *Ibid.* When a court acts for those purposes, its jurisdiction "is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied." *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 23 (1825) (Marshall, C.J.); *Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166, 187 (1867). As this Court has explained, "[t]he judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended, if, after the judgment, it could be arrested in its progress, and denied the right of enforcing satisfaction." *Bank of the United States* v. *Halstead*, 23 U.S. (10 Wheat.) 51, 53 (1825).[2]

The First Congress provided the federal courts with power to effectuate their judgments in Section 14 of the Judiciary Act of 1789, which authorized the courts to "issue writs of scire facias, habeas corpus, and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." 1 Stat. 81-82 (ch. 20). See *Wayman*, 23 U.S. at 23 ("There is no reason for supposing that the general term 'writs,' is restrained by the words, 'which may be necessary for the exercise of their respective jurisdictions,' to original process, or to process anterior to judgments. * * * It is * * * no unreasonable extension of the words of the act, to suppose an execution necessary for the exercise of jurisdiction."); accord *Halstead*, 23 U.S. at 55; *Riggs*, 73 U.S. at 192. That statutory authorization is now codified in 28 U.S.C. 1651(a), which empowers the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." See *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U.S. 34, 40 (1985) ("[T]his Court consistently has construed the All Writs Act to authorize a federal court 'to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.' ").

[2] See also 23 U.S. at 64 ("An execution is the fruit and end of the suit, and is very aptly called the life of the law. The suit does not terminate with the judgment; and all proceedings on the execution, are proceedings in the suit."); *Riggs*, 73 U.S. at 187 ("Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution."); *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239 (1934) ("That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled.").

While the doctrine of ancillary jurisdiction "can hardly be criticized for being overly rigid or precise," *Kokkonen*, 114 S. Ct. at 1676, the standard governing enforcement jurisdiction is readily stated: Proceedings that are maintained to effectuate or prevent the frustration of a court's judgment fall within the scope of its ancillary jurisdiction; proceedings that are "entirely new and original" do not. See *Krippendorf* v. *Hyde*, 110 U.S. 276, 285 (1884). Under that standard, the proceedings to collect on the Tru-Tech judgment by holding petitioner personally liable for paying it fell within the district court's ancillary jurisdiction. See *Swift & Co. Packers* v. *Compania Colombiana del Caribe, S.A.*, 339 U.S. 684, 694-695 (1950) (recognizing court's power "to protect its jurisdiction from being thwarted by a fraudulent transfer" of assets from defendant to straw corporation organized and controlled by it); *Dewey* v. *West Fairmont Gas Coal Co.*, 123 U.S. 329, 332-333 (1887) (fraudulent conveyance

action against third party "was an exercise of jurisdiction * * * ancillary to that which [the court] had already acquired in the action at law"); *Empire Lighting Fixture Co.* v. *Practical Lighting Fixture Co.*, 20 F.2d 295, 297 (2d Cir. 1927) (L. Hand, J.) (exercising ancillary jurisdiction where majority shareholder fraudulently conveyed corporate assets to defeat a judgment); *Blackburn Truck Lines, Inc.* v. *Francis*, 723 F.2d 730, 732-733 (9th Cir. 1984) (post-judgment action to pierce corporate veil is proceeding in aid of underlying judgment).[3]

2. Petitioner's contrary arguments derive from a constricted view of ancillary jurisdiction that cannot be squared with this Court's holdings. Petitioner maintains that "any exercise of ancillary jurisdiction * * * must be *necessary* to the court's function in adjudicating a given case," Pet. Br. 37, and argues that "the availability of a

[3] This Court has approved the exercise of ancillary jurisdiction in a wide variety of circumstances. See, *e.g.*, *Dugas* v. *American Surety Co.*, 300 U.S. 414, 428 (1937) (to support judgment holding party not liable by blocking suit by nonparty that would have had the effect of imposing liability); *Alexander* v. *Hillman*, 296 U.S. 222, 239 (1935) (to permit receiver to recover fraudulent conveyances made to corporate officers); *Local Loan Co.*, 292 U.S. at 239 (to block state court action to assign wages of debtor whose debts had been discharged in bankruptcy); *Root* v. *Woolworth*, 150 U.S. 401, 413 (1893) (to enforce judgment denying party title to land, when that party moved back onto the land and started leasing it); *Labette County Comm'rs* v. *United States ex rel. Moulton*, 112 U.S. 217, 221 (1884) (to require county commissioners to levy tax to pay judgment against township); *Krippendorf*, 110 U.S. at 286 (to entertain dispute regarding ownership of attached property); *Riggs*, 73 U.S. at 198 (to require county officers to levy tax to pay judgment against county). See also 12 C. Wright & A. Miller, *Federal Practice and Procedure* § 3012, at 66-68 (1973) (garnishment, arrest, mandamus, contempt, appointment of receiver, determination of liability of successor corporation, and issuance of deficiency judgment are "proceedings supplementary to and in aid of judgment").

state forum to try matters such as this one [suggests] that federal court jurisdiction over an action like this one is not 'necessary,'" *id.* at 40. That formulation has no basis in the law.

This Court has held, repeatedly, that the power to enforce a judgment is a power "necessary for the exercise of jurisdiction," *Wayman*, 23 U.S. at 23; accord *Halstead*, 23 U.S. at 55; *Riggs*, 73 U.S. at 187, but it has never gauged a court's power in a given case by whether its exercise is essential, in the sense that resort could not be had to state court. See *Pennsylvania Bureau of Correction*, 474 U.S. at 40 (courts' "supplemental powers [under the All Writs Act] are not limited to situations where it is 'necessary' to issue the writ or order 'in the sense that the court could not otherwise physically discharge its * * * duties"). State courts are, and have always been, capable of entertaining actions in aid of federal judgments. Indeed, under Rule 69(a) of the Federal Rules of Civil Procedure and its statutory antecedents, Congress has directed federal courts to adopt state practices and procedures in proceedings for the execution of money judgments. See pages 23-24, *infra*. If petitioner's conception of "necessity" were the rule, the federal courts would have no enforcement jurisdiction in such cases.

Even petitioner concedes that a court has jurisdiction (regardless of the availability of a state forum) to enforce a money judgment against the parties thereto. See Pet. Br. 38. His argument therefore reduces to a claim that the relief afforded in this case exceeded the bounds of enforcement jurisdiction, because respondent filed "a new lawsuit," *id.* at 40, "with a new claim and a new substantive remedy," against a person not otherwise subject to the judgment, *id.* at 38-39. Those attributes do not distinguish this case from others in which this Court has approved the exercise of ancillary jurisdiction.

The argument (Pet. Br. 40-41) that this proceeding is not ancillary because it has "a new caption," and was "begun with a new summons and complaint," rests on notions of formal pleading that do not govern the existence *vel non* of subject matter jurisdiction. This Court rejected a similar argument in *Alexander* v. *Hillman*, 296 U.S. 222 (1935), which held that a supplemental bill filed by corporate receivers was not "an original bill for the commencement of a suit," even though filed in a "form not inappropriate for commencement of suit." *Id.* at 239. Recognizing that the bill was "in fact formulated and filed to serve as a pleading in the main suit," the court explained that "[t]reating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights of all the parties." *Ibid.* In this case, similarly, the district court and the court of appeals both recognized that, although filed as a separate action, respondent's suit was in substance an action to collect the underlying money judgment. Pet. App. 57a; *id.* at 3a.[4] To the extent that respondent's papers stated "[d]efective allegations of jurisdiction," such defects may be corrected on appeal. See 28 U.S.C. 1653.

Nor is this proceeding rendered non-ancillary because it involves some facts and legal issues distinct from those on which the underlying suit was based. The species of ancillary jurisdiction that is at issue in this case is analytically distinct from the doctrine more commonly known as "pendent jurisdiction," under which a court may dispose of claims that are otherwise beyond its juris-

[4] That was petitioner's understanding as well. See Pet. C.A. Br. 15 ("Plaintiff has * * * consistently characterized this lawsuit as an action for the collection of a judgment.").

diction because they are factually interdependent with the claims that form the basis for its jurisdiction. See *Kokkonen*, 114 S. Ct. at 1676; see generally S. Glenn, Note, *Federal Supplemental Enforcement Jurisdiction*, 42 S.C. L. Rev. 469 (1991).[5] In most cases in which a federal court acts to preserve its authority or effectuate its judgments, whether through attachment, mandamus, garnishment, or the voidance of fraudulent conveyances, the action will not turn on the facts and bases for liability involved in the underlying suit. In enforcement proceedings, the requisite "logical dependence," see *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 376 (1978), lies in the attempt through the latter proceeding to enforce the judgment obtained in the former.[6]

There is also nothing exceptional in the assertion in supplementary proceedings of claims against third persons who were not parties to the underlying suit. This Court has sanctioned the exercise of ancillary jurisdiction

[5] Unlike its amicus, see National Association of Real Estate Investment Managers Amicus Br. (Mgrs. Br.) 10-12, petitioner acknowledges that, "[w]hen dealing with [a court's enforcement jurisdiction], the familiar common-nucleus test for determining what constitutes a single constitutional case cannot be applied," Pet. Br. 36-37; accord Glenn, *supra*, 42 S.C. L. Rev. at 493-495.

[6] Petitioner's amicus is incorrect in asserting that "this Court has never held that jurisdiction exists to allow a plaintiff in a subsequent action to bring a claim that requests relief of a 'different kind' or that rests on a 'different principle.'" Mgrs. Br. 5 (quoting *Dugas*, 300 U.S. at 428). Post-judgment actions in support of monetary awards often seek relief of a "different kind" by invoking the courts' equitable powers. See *Dewey*, 123 U.S. at 332-333; *Local Loan Co.*, 292 U.S. at 239. And because supplemental actions may involve contested rights to property and other matters governed by state law, they may rest on "different principles" than those relevant to the underlying case. To the extent that *Dugas* may be read to state otherwise, "[t]he doctrine of ancillary jurisdiction [is not as confined] as that statement suggests." *Kokkonen*, 114 S. Ct. at 1676.

over disputes with nonparties regarding the ownership of attached property, see, *e.g.*, *Minnesota Co.* v. *St. Paul Co.*, 69 U.S. (2 Wall.) 609 (1864); *Krippendorf* v. *Hyde*, *supra*; *Swift & Co. Packers* v. *Compania Colombiana del Caribe, S.A.*, *supra*;[7] garnishment, see *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 834 n.10 (1988);[8] voidance of fraudulent conveyances, see *Dewey* v.

[7] Ancillary jurisdiction over disputes regarding the ownership of attached property has been justified, in part, on the unfairness of leaving a third-party claimant without a remedy in the court that has sole possession and control over the subject property. See, *e.g.*, *Krippendorf*, 110 U.S. at 281; *Finley* v. *United States*, 490 U.S. 545, 551 (1989). Even assuming that possession of the property establishes jurisdiction over the dispute, that does not answer why the courts have jurisdiction, in the first place, to order the attachment of property whose ownership is subject to dispute. The Court adverted to that point in *Swift & Co. Packers*:

> Disputes over ownership of attached vessels are of course inevitable since only the respondent's property may be attached. Inevitably such disputes may involve transactions not themselves the subject matter of an independent libel. If jurisdiction be wanting in a court of admiralty when such a controversy arises in the context of an attachment made in a libel over which the court indubitably has jurisdiction, a congenital defect would have to be attributed to the ancient process of foreign attachment.

339 U.S. at 693 (citations omitted).

[8] See also *Vukadinovich* v. *McCarthy*, 59 F.3d 58, 62 (7th Cir. 1995) (Posner, J.) ("Garnishment is a standard, often essential, step in the collection of a judgment, and the party holding the judgment * * * ought to be able to take this step without having to start a new lawsuit in a different court system."). Other lower courts generally agree. See *Skevofilax* v. *Quigley*, 810 F.2d 378, 385 (3d Cir.) (en banc), cert. denied, 481 U.S. 1029 (1987); *United States ex rel. Goldman* v. *Meredith*, 596 F.2d 1353, 1357 (8th Cir.), cert. denied, 444 U.S. 838 (1979); *Sandlin* v. *Corporate Interiors Inc.*, 972 F.2d 1212, 1216 (10th Cir. 1992); *In re American Freight System, Inc.*, 173 B.R. 739 (Bankr. D. Kan. 1994); but see *Berry* v. *McLemore*, 795 F.2d 452, 455-456 (5th Cir. 1986).

West Fairmont Gas Coal Co., *supra*;[9] and actions to require public officials to levy taxes to pay money judgments against state subdivisions, see *Riggs* v. *Johnson County*, *supra*; *Labette County Comm'rs* v. *United States ex rel. Moulton*, *supra*.

A supplemental bill to pierce the veil of a corporate judgment debtor is no less clearly dependent on an underlying suit than are proceedings for garnishment or voidance of fraudulent conveyances. Although the latter can be described as mere attempts to trace the assets of the judgment debtor, the former can just as easily be described as an attempt to identify the judgment debtor,[10] similar in that respect to identification of a successor

[9] In *Dewey*, the defendant/counterclaimant in an action at law filed a bill in equity against a nonparty who allegedly had received a fraudulent conveyance from the plaintiff. The bill was filed prior to the judgment in the underlying action, to secure property that might be needed to pay the counterclaim. This Court concluded that "[t]he suit in equity was an exercise of jurisdiction on the part of the Circuit Court ancillary to that which it had already acquired in the action at law." 123 U.S. at 332-333. (It is irrelevant, for purposes of assessing the existence of ancillary jurisdiction, that the bill in *Dewey* was filed prior to judgment, as a precautionary matter, rather than after the judgment, to secure satisfaction of it. See *Swift & Co. Packers*, 339 U.S. at 694.) See also *Marsh* v. *Burroughs*, 16 F. Cas. 800, 802 (C.C.S.D. Ga. 1871) (No. 9,112) ("[I]t has long been settled that a judgment creditor * * * may * * * file a bill against persons holding property of the debtor which, on account of fraud * * *, cannot be reached by execution.").

[10] See, *e.g.*, *Massachusetts Laborers' Health & Welfare Fund* v. *Starrett Paving Corp.*, 845 F.2d 23, 26 (1st Cir. 1988) (Breyer, J.) ("When state law pierces the corporate veil, where the owner is the corporation's alter ego, where state or other relevant federal law makes the owner liable, it is fairly easy to say that the owner *is* the corporation.").

corporation.[11] Garnishment, contested attachment, and fraudulent conveyance proceedings, like the action at issue in this case, involve the adjudication of third parties' substantive interests. In those proceedings, moreover, the third party may well have no significant relationship with either the judgment debtor or the judgment. In this case, by contrast, petitioner was held liable because he gutted the judgment debtor, which he controlled, purposefully to frustrate collection of the judgment.

Petitioner's contrary argument cannot, in any event, be reconciled with this Court's holdings in *Riggs* and *Labette County Comm'rs*. In *Riggs*, after a bondholder obtained a money judgment in federal court against the county that had issued the bonds, a state court enjoined the county officers from levying a tax to pay the judgment. This Court affirmed the jurisdiction of the federal court to issue a writ of mandamus directing the county officers to levy the tax, concluding that the proceeding was not "a new suit, in the jurisdictional sense," but "a proceeding ancillary to the judgment which g[ave] the jurisdiction," and that the writ "substitute[d] for the ordinary [state law] process of execution to enforce the payment of the same." 73 U.S. at 198.

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[11] Under Rule 25(c) of the Federal Rules of Civil Procedure, "[i]n case of any transfer of interest, * * * the court upon motion [may] direct[] the person to whom the interest is transferred to be substituted in the action." Such substitution may be ordered in the course of post-judgment enforcement proceedings. 3B J. Moore, *Moore's Federal Practice* ¶ 25.03, at 25-21 (2d ed. 1995); *Explosives Corp. of America* v. *Garlam Enterprises Corp.*, 817 F.2d 894, 907 (1st Cir.), cert. denied, 484 U.S. 925 (1987); *Minnesota Mining & Mfg. Co.* v. *Eco Chem, Inc.*, 757 F.2d 1256, 1262-1263 (Fed. Cir. 1985); *Panther Pumps & Equipment Co.* v. *Hydrocraft, Inc.*, 566 F.2d 8, 23 (7th Cir. 1977), cert. denied, 435 U.S. 1013 (1978). See also *Dunn* v. *Clarke*, 33 U.S. (8 Pet.) 1, 3 (1834) (ancillary jurisdiction exists as to post-judgment claims respecting "parties or privies to the suit at law").

Petitioner contends that the action in *Riggs* "did not impose liability on a stranger to the judgment," and instead merely "directed compliance with the court's order by the party with the authority to render that compliance." Pet. Br. 35 n.25.[12] In *Riggs*, however, the petition for mandamus was filed against county officers, who were not parties to the initial action, and ultimately sought an order that would have the effect of imposing liability for the judgment on the county's taxpayers. The imposition of liability on petitioner—a controlling shareholder who intentionally obstructed collection of a judgment against the corporation—was tied more closely to the underlying action.

In *Labette County Comm'rs*, this Court affirmed the jurisdiction of a circuit court, which had adjudicated a township's liability on bonds, to issue a writ of mandamus to compel the county board of commissioners to levy a tax on property within the township to pay the judgment. The Court rejected the argument that the mandamus proceeding was not ancillary because it involved persons who were not parties to the underlying suit:

> [I]t does not follow because the jurisdiction in mandamus is ancillary merely that it cannot be exercised

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[12] The dissent in *Riggs* made many of the arguments respecting the limits of ancillary jurisdiction that petitioner raises in the present case. See, *e.g.*, 73 U.S. at 206 ("The subject-matter of the suit in the Federal court was the ordinary collection of a debt from Johnson County. * * * The County of Johnson is a corporation capable to sue and be sued. The supervisors are officers of whom certain duties are required. They are not identical, and cannot be sued for the same purpose."); *id.* at 207 ("It is clear that it is not a mere ancillary writ, but is in all cases a separate action."); *id.* at 208 ("We have already shown that the parties are different. The purpose of it is to enforce the levy of a tax; an object which could never be obtained, and which is not within the scope of an action of assumpsit.").

over persons not parties to the judgment sought to be enforced. * * *

> The question is, whether the respondents, to whom the writ is addressed, have the legal duty to perform, which is required of them, and whether the relator has a legal right to its performance from them, by virtue of the judgment he has already obtained. If so, then they are, as here, the legal representatives of the defendant in that judgment, as being the parties on whom the law has cast the duty of providing for its satisfaction.

112 U.S. at 221. Just as the Labette County Commissioners had a duty to levy a tax to pay the judgment on the municipal bonds, so too does petitioner have a duty to pay the judgment owed by his corporate alter ego. See pages 25-26, *infra*.

3. A given enforcement claim may be sufficiently attenuated from the underlying action that, absent an independent basis for subject matter jurisdiction, the claim should not be entertained in federal court. See, *e.g.*, *Skevofilax* v. *Quigley*, 810 F.2d 378, 388-389 (3d Cir.) (en banc) (Becker, J., concurring in the judgment) (positing "post-judgment pursuit of a questionable gambling debt allegedly due the defendant from a non-diverse party who was not involved in the principal litigation"), cert. denied, 481 U.S. 1029 (1987). But the existence of that possibility in some instances does not counsel the creation of new and rigid jurisdictional rules. This Court has wisely refused to circumscribe the scope of the courts' enforcement authority, in light of the variety of ways in which parties and their privies may seek to frustrate lawful judgments. Moreover, the existence of jurisdiction does not compel its exercise. *Local Loan Co.*, 292 U.S. at 241; *Swift & Co. Packers*, 339 U.S. at 695 ("[B]ecause power exists, its use is not inexorable."); *Argento* v. *Village of Melrose Park*, 838 F.2d 1483, 1490 (7th Cir. 1988) ("[I]t is within the

district court's discretion to determine when it is appropriate to exercise ancillary jurisdiction."). Thus, courts may consider matters such as judicial economy, comity,[13] and fairness to litigants, and should assure a sufficient nexus to the underlying judgment. Cf. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966).

Although we agree with petitioner (see Pet. Br. 41-42) that evidence of specific congressional intent may be relevant to the scope and proper exercise of a court's ancillary jurisdiction to enforce a judgment obtained under a federal statute, that consideration argues for broad authority to enforce judgments rendered under ERISA. Congress recognized in the Act itself that the substantive provisions of ERISA would be effective only if combined with "appropriate remedies, sanctions, and ready access to the Federal courts," 29 U.S.C. 1001(b), and ERISA's enforcement provisions accordingly were "designed specifically to provide * * * participants and beneficiaries with broad remedies for redressing or preventing violations of the Act," H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973).[14] To that end, ERISA provides nationwide venue and service of process, and, except for certain actions to recover benefits, exclusive federal jurisdiction in suits to enforce the Act. 29 U.S.C. 1132(a),

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[13] Comity will not necessarily counsel abstention. "A rule requiring that there be a separate state lawsuit to enforce a federal court judgment by garnishment process would actually impair any identifiable interest of that state. It would impose on the state courts the role of serving as an auxiliary or adjunct to the district court by cleaning up the loose ends of a district court lawsuit." *Skevofilax*, 810 F.2d at 385.

[14] See also H.R. Rep. No. 533, *supra*, at 17 (ERISA was drafted "to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants"); S. Rep. No. 127, 93d Cong., 1st Sess. 35 (1973).

(e)(1) and (2), and (f) (1988 & Supp. V 1993). In addition, ERISA's principal enforcement provisions (pled by respondent in the initial action against Tru-Tech, see *Tru-Tech* Complaint 6-7) bestow on the courts expansive remedial authority. See 29 U.S.C. 1109(a) ("such other equitable or remedial relief as the court may deem appropriate"); 29 U.S.C. 1132(a)(3) ("other appropriate equitable relief * * * to redress such violations"). Congress's intention to ensure a federal forum and to provide effective equitable remedies supports the existence of corresponding authority to effectuate judgments rendered under the Act, including, as in this case, the invocation in appropriate circumstances of the equitable remedy of piercing the corporate veil.

4. The decision of the court of appeals is consistent with *H.C. Cook Co.* v. *Beecher*, 217 U.S. 497 (1910). In *Beecher*, the plaintiff previously had sued a corporation for patent infringement and attempted "at the last moment" to add the corporation's directors as defendants. *H.C. Cook Co.* v. *Beecher*, 172 F. 166 (C.C.D. Conn. 1909), aff'd, 217 U.S. 497 (1910). The circuit court concluded that the directors could have been added "[u]pon a proper showing," but had refused to do so because the attempt "came too late." *Ibid.* After obtaining a judgment against the corporation, the plaintiff filed a second suit in the same circuit court to collect the judgment from the directors, alleging that they were liable as "joint trespassers" in the patent infringement. *Ibid.* The circuit court dismissed the action. It held that the plaintiff had failed to plead a claim of patent infringement against the directors, because "[n]either the validity of the patent nor its infringement [wa]s put in issue by the complaint." *Id.* at 167. The court further held that the suit was not in the nature of an ancillary action, reasoning that, because the plaintiff had "acquiesced in" the court's refusal to add the directors as

parties in the prior suit, the court's "jurisdiction * * * over [the] parties as litigants in a patent suit ended" with the entry of judgment against the corporation alone. *Ibid.*

In this Court, the plaintiff in *Beecher* did not rely on ancillary jurisdiction, but instead argued "that the [directors] and their corporation were joint tort-feasors, and that this [wa]s a suit against the defendants for their part in infringing its patent." 217 U.S. at 498. The Court rejected that argument, agreeing with the circuit court that the complaint read as "an attempt to make the [directors] answerable for the judgment already obtained." *Ibid.* The Court found that reading supported by the fact that one of the grounds of jurisdiction urged in the circuit court was that the action was ancillary to the judgment in the former suit—although the Court added (in what is best regarded as dictum) that "of course it [was] not." *Id.* at 498-499. The Court then concluded that, "*[a]part from that contention*, * * * if the directors are under obligations by Connecticut law to pay a judgment against their corporation, that is not a matter that can be litigated between citizens of the same State in the Circuit Court of the United States." *Id.* at 499 (emphasis added).

Because the Court did not elaborate, it is unclear why it stated that the action was not ancillary to the judgment in the former suit.[15] But the opinion in *Beecher* is perhaps best read, in light of the facts, to indicate that a party may

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[15] The lower courts have also found the opinion perplexing. See, *e.g.*, *Sandlin*, 972 F.2d at 1217 (a "cryptic" opinion); *Argento*, 838 F.2d at 1488 ("three paragraphs long containing a conclusion, but virtually no discussion"); *Skevofilax*, 810 F.2d at 385 n.4 (a "delphic pronouncement"). Perhaps for that reason, the case has rarely been cited (and never by this Court). Although *Beecher* is amenable to various interpretations, the interpretation urged by petitioner (Pet. Br. 29-31) would, as we have explained, be inconsistent with the Court's prior and subsequent holdings.

not invoke a court's ancillary jurisdiction to raise issues that could have been timely raised in the underlying proceeding.[16] In this case, respondent is not attempting to add a claim that he neglected to raise in the litigation against Tru-Tech; respondent alleges that petitioner took steps after the Tru-Tech judgment to frustrate its satisfaction, not that petitioner was a "joint trespasser" in Tru-Tech's underlying fiduciary breach.

Moreover, the plaintiff in *Beecher* did not claim that the directors should be held liable as alter egos of the defendant corporation. The directors were alleged to have acted within their capacities as directors when they determined that the defendant corporation would continue to sell the allegedly infringing products during the pendency of the suit. 217 U.S. at 498. As Judge Learned Hand later explained, in *Beecher* "the plaintiff tried to hold the directors of a company upon their liability as such." *Empire Lighting*, 20 F.2d at 297. The claim made against the directors in *Beecher* was "truly

[16] The Court's lone citation, to *Stillman* v. *Combe*, 197 U.S. 436 (1905), supports that reading. In *Stillman*, the Court held that a federal circuit court lacked ancillary jurisdiction to adjudicate parties' conflicting claims to land, when those parties had earlier dismissed their suit and agreed to support the rights of two of their number to effect a sale of the property to the United States, with an understanding that they would later arbitrate their respective interests in the proceeds. *Id.* at 441. The Court explained: "The parties gave up their right to have the court decide who had rights in the land and the extent of their shares, and substituted a contract and a decision out of court. They still rely upon the contract, and they must be left to their remedy upon it." *Ibid.* *Stillman* therefore resembles *Kokkonen*, in which the Court found no ancillary jurisdiction to enforce the terms of a settlement agreement that was not incorporated into the order of dismissal. In *Stillman*, as in *Kokkonen*, "the only order [at issue] was that the suit be dismissed, a disposition that [was] in no way flouted or imperiled by the alleged breach of the settlement agreement." 114 S. Ct. at 1677.

'independent' " (Pet. App. 15a), in the sense that it alleged either a substantive federal patent law violation by the directors or a pure state law claim against them (see *Cushman* v. *Warren-Scharf Asphalt Paving Co.*, 220 F. 857, 862 (7th Cir.), cert. denied, 238 U.S. 621 (1915)), not a federal claim based on a scheme to deprive the patent holder of his federal judgment.

5. Petitioner did not present to this Court the question whether, if the district court had ancillary jurisdiction in this case, it correctly ruled on the merits that petitioner is liable for the 1988 judgment against Tru-Tech. There accordingly is no occasion for this Court to decide whether the federal courts should borrow veil-piercing and alter-ego principles from state law in cases such as this, or should instead develop uniform federal principles. Resolution of that issue would not affect the outcome of this case in any event, since both the district court and the court of appeals found the federal common law standard they adopted consonant with that used in South Carolina. See Pet. App. 22a n.16, 47a. We shall nevertheless offer some general observations about that issue, in order to place this case in a broader context.

Although the enforcement of judgments by federal courts is authorized and controlled by federal law, Congress has long directed the courts, in actions at common law, to borrow state law enforcement procedures. See *Riggs*, 73 U.S. at 189-192; see, *e.g.*, *Krippendorf* v. *Hyde*, *supra* (applying Indiana process for attachment of property); *Dewey* v. *West Fairmont Gas Coal Co.*, *supra* (applying West Virginia law of fraudulent conveyances). Insofar as money judgments are concerned, that direction now resides in Rule 69(a) of the Federal Rules of Civil Procedure, which provides in relevant part:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court

> directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, * * * except that any statute of the United States governs to the extent that it is applicable.

Under Rule 69(a), in the absence of a controlling federal statute, "the same relief is available in federal court for the satisfaction of a federal court judgment as would be available in a state court." *Skevofilax*, 810 F.2d at 384.

As the court below observed (Pet. App. 12a), and petitioner conceded below (Pet. C.A. Br. 26-27), " 'piercing the corporate veil' is not a separately maintainable cause of action; instead it is a theory of recovery applicable in actions against corporations." See also 1 W. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 41, at 603 (1990). Whether to pierce the corporate veil is, in that respect, an equitable determination "subsidiary to [a] primary cause of action." Pet. App. 12a. In circumstances in which an alter ego's liability is premised on its responsibility for the corporation's violation of a federal statute, the decision whether to pierce the corporate veil is subsidiary to the underlying cause of action, and the standard for assessing alter-ego liability is, quite properly, informed by the policies and purposes of the federal statute.[17] See *First Nat'l City Bank* v. *Banco*

[17] For that reason, we agree with the majority of the courts of appeals, which, in cases arising under ERISA, have looked to the policies of the Act in determining whether to hold liable as an alter ego a person who controlled the corporate defendant at the time of the statutory violation. See *United Elec. Workers* v. *163 Pleasant St. Corp.*, 960 F.2d 1080, 1092 (1st Cir. 1992); *Lowen* v. *Tower Asset Management, Inc.*, 829 F.2d 1209, 1220-1221 (2d Cir. 1987); *Laborers' Pension Trust Fund* v. *Sidney Weinberger Homes, Inc.*, 872 F.2d 702, 704-705 (6th Cir. 1988); *Laborers Clean-Up Contract Admin. Trust Fund* v. *Uriarte Clean-Up Service, Inc.*, 736 F.2d 516, 523-524 (9th Cir. 1984); *Combs* v. *Ryan's Coal Co.*, 785 F.2d 970, 982-983 (11th Cir.), cert. denied, 479 U.S. 853 (1986); but see *Levit* v. *Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1193-1194 (7th Cir. 1989) (applying state law standard).

Para El Comercio Exterior de Cuba, 462 U.S. 611, 629-630 (1983) ("[T]he Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies."); 1 W. Fletcher, *supra*, § 41, at 166; see, *e.g.*, *Pierce* v. *United States*, 255 U.S. 398 (1921) (enforcing shareholders' liability for holding company's double indemnity obligations under federal banking law).

In this case, however, petitioner's liability for the 1988 judgment was not premised on a determination that he was responsible for Tru-Tech's violation of ERISA. Rather, petitioner was ordered to pay the judgment entered against Tru-Tech because, *after* the statutory violation, he siphoned the corporation's assets purposely to frustrate respondent's ability to collect the judgment. That conduct implicated not only the statutory interest under ERISA in protecting the rights of plan participants and their beneficiaries, see 29 U.S.C. 1001(b), but also (and more immediately) the interest in enforcing and preventing the frustration of the existing judgment. When the veil-piercing inquiry is subsidiary and antecedent to collection of a judgment, Rule 69(a) suggests that a federal court should look in the first instance to state law. At least where application of a state law standard would not frustrate the relevant interests in enforcing the judgment (see *Hankins* v. *Finnel*, 964 F.2d 853, 860-861 (8th Cir.), cert. denied, 113 S. Ct. 635 (1992); cf. *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048, 2055 (1994)), that standard would appropriately furnish the rule of decision. See *United States* v. *Pena*, 731 F.2d 8, 12-13 (D.C. Cir. 1984) (applying state law veil-piercing standard to ancillary claim);

Christiansen v. *Mechanical Contractors Bid Depository*, 404 F.2d 324, 325 (10th Cir. 1968) (same); cf. *Sandlin* v. *Corporate Interiors Inc.*, 972 F.2d 1212, 1218 (10th Cir. 1992) (reaffirming *Christiansen* in post-judgment transfer context).

The South Carolina courts use a two-prong test for piercing the corporate veil. *Multimedia Publishing of South Carolina, Inc.* v. *Mullins*, 431 S.E.2d 569, 571 (S.C. 1993). The first prong is an eight-factor analysis of the shareholder's relationship to the corporation, focussing on the observance (or not) of corporate formalities by the dominant shareholder. *Cumberland Wood Products, Inc.* v. *Bennett*, 417 S.E.2d 617, 619 (S.C. Ct. App. 1992).[18] The second prong requires proof that shielding the dominant shareholder from liability would be fundamentally unfair. *Mullins*, 431 S.E.2d at 571. "The burden of proving fundamental unfairness requires that the plaintiff establish (1) that the defendant was aware of the plaintiff's claim against the corporation, and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff's claim in the property." *Sturkie* v. *Sifly*, 313 S.E.2d 316, 319 (S.C. Ct. App. 1984). That test adequately serves the purposes of ERISA in furnishing appropriate relief in a case such as this.[19]

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[18] The factors are "(1) whether the corporation was grossly undercapitalized; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) insolvency of the debtor corporation at the time; (5) siphoning of funds of the corporation by the dominant stockholder; (6) non-functioning of other officers or directors; (7) absence of corporate records; and (8) the fact that the corporation was merely a facade for the operations of the dominant stockholder." *Cumberland Wood Products*, 417 S.E.2d at 619.

[19] Petitioner argues (Pet. Br. 26 n.16, 27 & n.17) that because he did not control Tru-Tech or appropriate its property until after Tru-Tech committed the ERISA violations, the appropriate remedy was a suit to void his fraudulent conveyances, not an action to pierce Tru-Tech's corporate veil. He contends, on that ground, that the district court erred in holding him liable for the entire judgment instead of ordering him to return the funds that he wrongfully appropriated. "[P]osttort activity," however, "when conducted to strip the corporation of its assets in anticipation of impending legal liability, may be considered in making the determination whether to disregard the corporate entity." 1 Fletcher, *supra*, § 45, at 821; see *Thoni Trucking Co.* v. *Foster*, 243 F.2d 570, 571 (6th Cir. 1957). And while some authorities hold that veil piercing should not be used in circumstances where improper transfers of corporate assets have been avoided as fraudulent conveyances, see, *e.g.*, *Morgan* v. *Burks*, 611 P.2d 751, 755-756 (Wash. 1980), or limit recovery in such circumstances to the amount of the wrongful transfer, see *AYR Composition, Inc.* v. *Rosenberg*, 619 A.2d 592, 598 (N.J. Super. Ct. App. Div. 1993), there is also authority to the contrary, see *Boyd* v. *Boyd & Boyd, Inc.*, 386 N.W.2d 540, 544-545 (Iowa Ct. App. 1986); see also, *e.g.*, *Minnesota Mining & Mfg. Co.* v. *Eco Chem, Inc.*, *supra*; *H.H. Robertson Co.* v. *V.S. DiCarlo General Contractors, Inc.*, 994 F.2d 476 (8th Cir.), cert. denied, 114 S. Ct. 621 (1993); *Thoni Trucking Co.* v. *Foster*, *supra*. We know of no South Carolina authority on the issue. In any event, as we have noted, petitioner did not seek review of whether the court of appeals correctly applied the principles of veil piercing.

II. ERISA DOES NOT PRECLUDE IMPOSITION ON PETITIONER OF LIABILITY FOR THE JUDGMENT RENDERED AGAINST TRU-TECH

Neither *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063 (1993), nor *Mackey* v. *Lanier Collection Agency & Service, Inc.*, *supra*, restricts the authority of a federal court to exercise its ancillary jurisdiction to enforce judgments obtained under ERISA. In *Mertens*, this Court held that ERISA does not provide a cause of action for money damages against a nonfiduciary who knowingly participates in a fiduciary breach, and suggested, in dicta (113 S. Ct. at 2067-2068), that ERISA may provide no cause of action at all against such a nonfiduciary. In the course

of that decision, the Court expressed its unwillingness "to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Id.* at 2067 (quoting *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146-147 (1985)). Relying primarily on *Mertens*, petitioner argues (Pet. Br. 15-20) that because ERISA already looks to substance, rather than corporate form, in defining who is a plan fiduciary, and thus who is liable for fiduciary misconduct, the courts may not hold liable a shareholder who does not qualify as a fiduciary under a veil-piercing theory that is not expressly codified in the Act. That issue is not presented in this case.

The issue raised by petitioner arises in suits filed against shareholders who are claimed to be responsible, under a veil-piercing theory, for ERISA violations committed by corporations that they control.[20] Petitioner was not held liable under a theory that he was responsible for Tru-Tech's fiduciary misconduct.[21] Rather, he was ordered to pay the judgment against Tru-Tech because, after the ERISA violation, he gained control of Tru-Tech and siphoned its assets to prevent collection of the judgment. Nothing in *Mertens* suggests that, because petitioner was found not to be liable as a fiduciary, he was thereby licensed to misuse his corporate position to thwart respondent's attempts to collect the judgment.

In *Mackey*, this Court recognized that ERISA itself provides no enforcement mechanism for collecting judgments obtained under the Act. 486 U.S. at 833. Accordingly, the Court concluded, the enforcement of ERISA judgments, like the enforcement of other federal judgments, is guided by Rule 69(a), and, "[c]onsequently, state-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA." *Id.* at 834. Rejecting the claim that Georgia's garnishment statute was preempted, the Court noted that "[w]hen Congress intended in ERISA to preclude a particular method of state-law enforcement of judgments, * * * it

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[20] The courts of appeals that have decided the issue raised by petitioner have uniformly recognized the propriety of veil piercing in actions under Section 515 of the Act, 29 U.S.C. 1145, to collect unpaid plan funding contributions. See, *e.g.*, *United Elec. Workers*, 960 F.2d at 1091-1096; *Lumpkin* v. *Envirodyne Indus., Inc.*, 933 F.2d 449, 460-463 (7th Cir.), cert. denied, 502 U.S. 939 (1991); *Leddy* v. *Standard Drywall, Inc.*, 875 F.2d 383, 387-388 (2d Cir. 1989); *Laborers' Pension Trust Fund*, 872 F.2d at 704-705; *Alman* v. *Danin*, 801 F.2d 1, 3-4 (1st Cir. 1986); *Combs*, 785 F.2d at 982-983; *Laborers Clean-Up Contract Admin. Trust Fund*, 736 F.2d at 523-524. See also *Lowen*, 829 F.2d at 1220-1221 (holding controlling shareholders liable for fiduciary breach).

[21] Petitioner argues that, since he was not held liable under a distinct ERISA cause of action, Section 502(e) of the Act, 29 U.S.C. 1132(e) (the nationwide service of process provision) cannot apply, and the decision below must be reversed for lack of personal jurisdiction. Pet. Br. 28 n.18. As petitioner notes (*id.* at 29 n.18), however, the court of appeals was silent respecting its reasons for rejecting petitioner's challenge to personal jurisdiction. Despite petitioner's contrary assertion, the court may have concluded that petitioner had sufficient contacts with South Carolina to satisfy due process. See *Minnesota Mining & Mfg. Co.*, 757 F.2d at 1265 ("[A] court which has jurisdiction over a corporation has jurisdiction over its alter egos."); accord *United Elec. Workers*, 960 F.2d at 1091; *Lakota Girl Scout Council, Inc.* v. *Havey Fund-Raising Management, Inc.*, 519 F.2d 634, 637 (8th Cir. 1975); *International Controls Corp.* v. *Vesco*, 490 F.2d 1334, 1350 (2d Cir.), cert. denied, 417 U.S. 932 (1974); *Velandra* v. *Regie Nationale des Usines Renault*, 336 F.2d 292, 296 (6th Cir. 1964). See also *I.A.M. Nat'l Pension Fund, Benefit Plan A* v. *Wakefield Indus., Inc.*, 699 F.2d 1254 (D.C. Cir. 1983) (holding that ERISA's nationwide service of process provision applies to those in privity with named defendant). In any event, because petitioner did not raise the issue of personal jurisdiction in his questions for review, the issue is not properly presented.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

D. GRANT PEACOCK, *Petitioner*

v.

JACK L. THOMAS, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT MANAGERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a federal court has ancillary jurisdiction to adjudicate a plaintiff's factually unrelated claim to enforce a prior judgment against a non-party to the original action.

2. Whether it is consistent with the statutory scheme of the Employee Retirement Income Security Act ("ERISA") to impose personal liability on a nonfiduciary by piercing the corporate veil of a fiduciary.

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT MANAGERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The National Association of Real Estate Investment Managers ("NAREIM") is an association of approximately 60 firms that manage large, equity-oriented real estate investments or act as investment and asset managers to various institutional holders of such real estate. Because ERISA pension plans are major investors in real estate,

NAREIM member firms often serve as investment manager fiduciaries of these plans. As a result, they have a strong interest in ensuring that any duties or liabilities imposed under ERISA with respect to such activities are consistent with the language of the statute and predictable in application. Specifically, shareholders (both corporate and individual) of real estate investment managers are ERISA fiduciaries only when they expressly assume that obligation or function as fiduciaries. Nonfiduciary shareholders thus have a substantial concern about being saddled with ERISA liability based on their corporate ownership rather than the established tests of fiduciary status.[1]

SUMMARY OF ARGUMENT

Respondent's veil-piercing action cannot proceed against petitioner for two independent reasons. First, this case does not fall within the ancillary jurisdiction of the federal courts. Adjudication of petitioner's liability is not necessary to vindicate the federal court's authority or to effectuate its decrees. There has been no allegation that anyone bound by the original judgment has flouted or failed to comply with that judgment. Rather, this "ancillary" action resulted in a completely *different* judgment against a *different* party premised on *different* facts and a *different* legal theory. This Court's controlling precedent precludes the assertion of ancillary jurisdiction when a judgment creditor seeks to require a nondiverse third party to pay the judgment. *H.C. Cook Co.* v. *Beecher*, 217 U.S. 497 (1910).

The action to impose liability on petitioner also lacks factual interdependence with the fiduciary action that preceded it. Determining the issue of fiduciary liability required an inquiry into whether petitioner or others exercised

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

discretionary authority and control over the management and administration of fund assets. By contrast, the veil-piercing action required an inquiry into a shareholder's dominance of his corporation and observation of the corporate form; indeed, it focused on conduct that occurred *after* the original judgment.

Second, even if ancillary jurisdiction exists, the Fourth Circuit's theory of implied liability is inconsistent with the explicit and careful distinctions in ERISA between the duties of those who are fiduciaries under the statute and those who are not. These distinctions have very significant practical implications. ERISA fiduciaries are subject to a stringent standard of care for their own conduct. Fiduciaries also can be held liable for acts and omissions of cofiduciaries as well as for violations of ERISA's prophylactic and highly technical prohibited transaction rules. These obligations cannot be contracted away even if the fiduciary acts in good faith and in the best interest of the plan and its participants and beneficiaries. The Fourth Circuit's expansion of the scope of such liability to the shareholders of fiduciaries undercuts ERISA's fundamental distinctions between fiduciaries and nonfiduciaries and is likely to increase materially the cost to investment managers of doing business.

In imposing ERISA liability on petitioner, a nonfiduciary, the Fourth Circuit did not purport to find either a specific cause of action or a specific source of authority of nonfiduciary duty under the statute, for there is none. It simply borrowed a liberal veil-piercing rule adopted in the totally different context of regulating the obligations of employers under ERISA. As this Court only recently held, however, there is a strong presumption against federal courts creating new causes of action or remedies within the ERISA statutory scheme. *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063, 2067 (1993).

The Fourth Circuit offered essentially no rationale for overcoming that presumption. In fact, allowing the action

created here would upset the delicate balance of competing interests legislated by Congress; it would render ERISA liabilities wholly unpredictable; and it would ignore statutory language showing that Congress has already regulated the relationship among plans, fiduciaries and their shareholders. Finally, there is a fundamental inconsistency between ERISA's functional definition of fiduciary status and corporate veil-piercing when used to impose liability on a nonfiduciary.

ARGUMENT

I. ANCILLARY JURISDICTION DOES NOT ENCOMPASS A PLAINTIFF'S UNRELATED POST-JUDGMENT CLAIMS AGAINST THIRD PARTIES

The Fourth Circuit's jurisdictional ruling vastly expands the scope of ancillary jurisdiction to include new and different claims, brought after the original action, involving parties and facts different from the original action. Ancillary jurisdiction, as it has been framed by this Court, does not reach so far.

This Court has identified two purposes served by the ancillary jurisdiction of the federal courts: (1) to permit disposition by a single court of claims that are factually interdependent; and (2) to enable a court to manage its proceedings, vindicate its authority, and effectuate its decrees. *Kokkonen* v. *Guardian Life Ins. Co. of America*, 114 S. Ct. 1673, 1676 (1994). Neither circumstance exists here.

A. The Expansion Of The Federal Court's Limited Jurisdiction Permitted Below Is Unnecessary To Enable The Court To Vindicate Its Authority

The Fourth Circuit did not hold that ancillary jurisdiction was necessary to vindicate the federal court's authority. The assertion of jurisdiction was not designed to enforce the judgment of a federal court. Rather, it was designed to enter

a new judgment holding a third party responsible for the liabilities imposed by the original judgment.

To be sure, federal courts have broad authority to enforce their judgments. See *Riggs* v. *Johnson County*, 73 U.S. 166, 187 (1867); *Bank of the United States* v. *Halstead*, 23 U.S. (10 Wheat.) 51 (1825). For example, federal courts have unquestioned jurisdiction to issue orders forcing a party to carry out the terms of the court's judgment. See, *e.g.*, *Dugas* v. *American Surety Co.*, 300 U.S. 414, 428 (1937); *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 367 (1921); *Root* v. *Woolworth*, 150 U.S. 401, 410-413 (1893). The enforcement proceeding enables the court to ensure that its rulings are given effect and that the parties bound by the judgment comply with it. See *id.* at 410-412.

The holdings of this Court make clear, however, that federal jurisdiction to enforce judgments in supplemental proceedings is not unlimited. *Kokkonen*, 114 S. Ct. at 1676-1677. Specifically, this Court has never held that jurisdiction exists to allow a plaintiff in a subsequent action to bring a claim that requests relief of a "different kind" or that rests on a "different principle." *Dugas*, 300 U.S. at 428; see, *e.g.*, *Beecher*, 217 U.S. at 499; *Hale* v. *Allinson*, 188 U.S. 56, 81 (1903). In fact, the Court has expressly rejected as "expansive" dicta the notion that a federal court has jurisdiction to provide precisely the kind of relief respondent seeks here. In *Kokkonen*, the Court declined to endorse a definition of ancillary jurisdiction as

> "[a] bill filed to continue a former litigation in the same court . . . to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties . . . or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court * * *."

114 S. Ct. at 1676 (quoting *Julian* v. *Central Trust Co.*, 193 U.S. 93, 113-114 (1904)).

The Fourth Circuit acknowledged that federal courts do not have jurisdiction over "independent" enforcement actions. Pet. App. 15a.[2] The court of appeals concluded, however, that respondent's veil-piercing action was *not* independent, because the action was a derivative claim that attempted to determine whether petitioner, a corporate shareholder, could be held liable for a pre-existing judgment entered against the corporation. *Id.* at 13a. The court reasoned that

> [b]ecause identification of those parties who are liable is necessarily antecedent to procedural enforcement of the judgment against those parties, and because *Riggs* establishes that federal courts have "ancillary" jurisdiction over enforcement of judgments, it would seem that the federal courts' "ancillary" jurisdiction would extend to the instant attempt to pierce the corporate veil.

Ibid. This reasoning plainly misconceives the breadth of ancillary jurisdiction and cannot be reconciled with this Court's decision in *H.C. Cook Co.* v. *Beecher*, 217 U.S. 497 (1910).

Beecher involved a suit by a judgment creditor of a corporation found liable for patent infringement who, unable to collect against the corporation, sued its directors. The judgment creditor alleged that the directors took actions during the pendency of the patent infringement proceeding to render the corporation insolvent in the event an adverse judgment was entered. After emphasizing that the second action did not deal with the patent but only the existence of the judgment, the Court flatly disagreed with the contention

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[2] It is undisputed that there is no diversity of citizenship and no basis for federal question jurisdiction here other than the fact that the suit seeks to enforce a judgment obtained pursuant to ERISA. Pet. App. 11a n.6.

that the action was "ancillary" to the judgment in the former suit, "which, of course, it is not." 217 U.S. at 498-499. The Court held that "if the directors are under obligations by Connecticut law to pay a judgment against their corporation, that is not a matter that can be litigated between citizens of the same state, in the [federal courts]." *Id.* at 499. Indeed, *Beecher* was a more compelling case for the exercise of ancillary federal jurisdiction, because the plaintiff charged that the defendants' activities, which occurred while the patent suit was being litigated, were intended to frustrate the effect of the federal judgment.

This Court has never departed from or questioned the holding of *Beecher*, and there is no reason for it to do so now. Indeed, the Court's recent decision in *Kokkonen* demonstrates the continuing vitality of the principles enunciated in *Beecher*. See 114 S. Ct. at 1676. Simply stated, ancillary jurisdiction, as framed by *Beecher* and *Kokkonen*, does not enable a federal court to entertain every subsequent action by a plaintiff to identify an individual or entity against whom an existing judgment might be satisfied. Rather, a federal court lacks ancillary jurisdiction to hear a claim where the plaintiff seeks a different kind of substantive relief. *Beecher* involved the question — not at issue in the original action — whether corporate shareholders were under a state-law obligation to pay a patent judgment already obtained against their corporation. This case involves the question — also not at issue in the original action — whether a controlling shareholder has an obligation to satisfy an ERISA judgment already obtained against his corporation. *Beecher* clearly held that the federal courts lack jurisdiction to hear this kind of ancillary claim. 217 U.S. at 497.

The Fourth Circuit sought to avoid the holding in *Beecher* in two ways, neither of which is persuasive. First, although the court of appeals observed that "the doctrine of piercing the corporate veil is not a mere procedural rule relating to 'how' a judgment is to be enforced, but is, rather,

a substantive rule of liability" (Pet. App. 12a), it ignored the obvious implication of this observation — that respondent was attempting to secure a different kind of relief. Instead, the court reasoned that any effort by a plaintiff to satisfy a prior federal judgment fell within the federal court's jurisdiction because it was "necessarily antecedent" to procedural enforcement of the judgment. *Id.* at 13a. This reasoning ignores the fact that "[a] distinction must be drawn between those acts which are necessary to enforce a judgment or order and those which are done merely for the sake of procedural convenience and bear no relationship to the court's earlier exercise of constitutional or statutory jurisdiction." *Eagerton* v. *Valuations, Inc.*, 698 F.2d 1115, 1119 (11th Cir. 1983). The Fourth Circuit's rationale would allow a claimant to use the federal courts to pursue anyone against whom an insolvent fiduciary might have a claim as "necessarily antecedent" to enforcing the federal judgment.[3]

The wrong alleged in this case is not one that imperils the operation of the federal court. See *Kokkonen*, 114 S. Ct. at 1676. In *Kokkonen*, the Court noted that "the only order here was that the suit be dismissed, a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement." *Id.* at 1677. Similarly, here the federal court's order was that Tru-Tech, Inc. ("Tru-Tech") was liable to respondent under ERISA and that petitioner was *not* liable, an order that is neither flouted nor imperiled by petitioner's unwillingness to assume the debts of Tru-Tech.

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[3] That petitioner was a party to the original proceeding is of no significance. The courts have held that a party found not liable in the original action should be considered a non-party in a subsequent enforcement action. *Argento* v. *Village of Melrose Park*, 838 F.2d 1483, 1488 n.7 (7th Cir. 1988); *Skevofilax* v. *Quigley*, 810 F.2d 378, 384 (3d Cir. 1987) (en banc), cert. denied, 481 U.S. 1029 (1987); *Berry* v. *McLemore*, 795 F.2d 452, 455 n.2 (5th Cir. 1986).

Indeed, it is perfectly consistent with the federal court's judgment that petitioner has no obligation to respondent under ERISA.

Just as the *Kokkonen* plaintiff asserted a purely state law claim, so does respondent. If, as respondent argues, petitioner improperly stripped Tru-Tech of its assets before the judgment could be satisfied, his remedy is a state court action to void the fraudulent transfers or pierce the corporate veil. Such an action would require the court to resolve new and different factual issues between new parties. Federal courts do not have the power to entertain such efforts. As *Beecher* makes clear, a plaintiff who brings a veil-piercing claim against a controlling shareholder is not attempting to enforce the federal judgment received against the corporation; rather, he is using the federal judgment to create new state law liabilities against a stranger to the federal judgment.

Second, the Fourth Circuit asserted that "*Beecher* is factually distinguishable from the case at bar." Pet. App. 15a. The court of appeals stated that "the instant case involves allegations that [petitioner] deliberately engaged in improper transfers and improperly ignored corporate formalities with the specific purpose of evading the already-extent [sic] judgment against Tru-Tech, [while] *Beecher* involved an allegation that corporate directors, acting within their legal capacity, voted to continue sales of a product which was the subject of a then-pending patent infringement suit." *Ibid.* We submit that the jurisdictional power of the federal courts to adjudicate substantively different claims in enforcement actions cannot rest on so slender a factual distinction. As just discussed, the question instead turns on whether the plaintiff is merely attempting to execute the prior judgment, or whether the plaintiff is attempting to impose liability on new parties on the basis of new grounds that involve the litigation of new and different questions. That is unquestionably the case here.

B. The Veil-Piercing Action Lacks The Factual Interdependence With The ERISA Action To Support Ancillary Jurisdiction

An exercise of ancillary jurisdiction also is inappropriate here because the underlying ERISA action and the subsequent veil-piercing action involve altogether different factual issues. The ERISA action involved the question whether Tru-Tech complied with its fiduciary duty in administering an ERISA plan. See Pet. App. 3a-4a. The veil-piercing action, by contrast, involved the question whether Tru-Tech and petitioner possess separate personalities.[4] No precedent of this Court justifies considering the veil-piercing action to be ancillary to the ERISA action.[5]

A fiduciary duty determination under ERISA and a veil-piercing determination not only are governed by different legal principles but also are highly fact-intensive. In assessing petitioner's fiduciary liability, the trial court looked at evidence of the business decisions made by Tru-Tech's officers and directors in establishing and administering the ERISA plan. The court expressly found that "[n]either D. Grant Peacock & Co. nor D. Grant Peacock exercised discretionary authority and control over the management and administration of the plan and disposition of its assets," and thus were not plan fiduciaries. *Thomas* v. *Tru-Tech*, No. 87-

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[4] In fact, the conduct that gave rise to the veil-piercing action arose primarily *after* the ERISA judgment had been entered. See Pet. App. 39a-41a; p. 24, *infra*.

[5] The conclusion that the veil-piercing action is not necessary to, or a part of, the underlying ERISA judgment is confirmed by *Mackey* v. *Lanier Collection Agency & Service*, 486 U.S. 825, 833 (1988), which held that "ERISA does not provide an enforcement mechanism for collecting judgments won" in actions brought against plans by either purported beneficiaries or general creditors.

2243-3, 1988 U.S. Dist. LEXIS 15929, *31-32 (D.S.C. Nov. 28, 1988).

In the veil-piercing action, the trial court looked at entirely different facts: evidence of moneys owed to and by Tru-Tech, transfers of notes and consideration paid therefor, and company accounting practices for periods before and after the original judgment. Pet. App. 40a-42a. This inquiry had virtually no overlap with the fiduciary duty inquiry. The factual interdependence between the two actions necessary to support ancillary jurisdiction is clearly lacking.

Rather than adopting an expansive view of federal jurisdiction to enforce judgments, this Court and the lower courts have generally asked whether the subsequent enforcement action arises from a common nucleus of operative facts with the underlying federal proceeding and therefore can be said to form part of the same constitutional case. See *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 371 (1978); *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). These courts have found that the requisite factual nexus is lacking when the plaintiff asserts unrelated, fact-specific, disputed claims, after the end of the principal litigation.[6]

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[6] See, *e.g.*, *Sandlin* v. *Corporate Interiors, Inc.*, 972 F.2d 1212, 1217 (10th Cir. 1992) ("when postjudgment proceedings seek to hold nonparties liable for a judgment on a theory that requires proof on facts and theories significantly different from those underlying the judgment, an independent basis for federal jurisdiction must exist"); *Berry*, 795 F.2d at 455 (finding that court lacked jurisdiction, in part, because original judgment arose from alleged constitutional violation and subsequent garnishment action arose from contract); *Redding Ford* v. *California State Board of Equalization*, 722 F.2d 496, 498 (9th Cir. 1983) ("ancillary jurisdiction cannot be extended beyond the claims asserted in one action"), cert. denied, 469 U.S. 817 (1984); *Manway Constr. Co.* v. *Housing Authority of Hartford*, 711 F.2d 501, 504 (11th Cir.

The Fourth Circuit should have followed the same approach. If it had, it would have been compelled to conclude that there is no common nucleus of fact between the issues raised in the ERISA action and the issues dispositive in the veil-piercing action. Thus, there is no basis to assert ancillary jurisdiction here.

II. PIERCING THE CORPORATE VEIL TO IMPOSE PERSONAL LIABILITY ON A NONFIDUCIARY IS INCONSISTENT WITH THE ERISA STATUTORY SCHEME

Respondent was awarded a judgment against Tru-Tech under ERISA. In the course of that litigation, Tru-Tech was held to be a fiduciary of an ERISA pension plan, and petitioner was held not to be a fiduciary. When Tru-Tech was unable to satisfy the judgment, respondent commenced this suit against petitioner, contending that ERISA contains an implied cause of action — corporate veil-piercing — that would make petitioner liable as if he were an ERISA fiduciary.

This theory of implied liability undercuts the explicit, carefully-crafted distinction in ERISA between the duties of those who are fiduciaries under the statute and those who are not. That distinction — unchanged since ERISA was enacted in 1974 — is fundamental in regulating the relationship between ERISA plans and those, such as the member firms of amicus curiae NAREIM, with whom the plans do business. These relationships have been guided for over 20 years by the definition of fiduciary status in ERISA. Particularly in view of this Court's unwillingness to infer causes of action under

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1983) (contempt action against garnishee bank raised state law claims, between non-diverse parties, and was "so far removed" from original contract action that ancillary jurisdiction could not be invoked).

ERISA (see *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063, 2067 (1993)), the decision below should be reversed.

A. ERISA Unambiguously Delineates Who Shall Bear The Burdens Of Fiduciary Responsibility

Congress devoted an entire subpart of ERISA to the subject of "Fiduciary Responsibility," §§ 401-414, 29 U.S.C. §§ 1101-1114. The core subject of this regulation, a "fiduciary" to a plan, must comply with detailed obligations set forth in the statute. The duties and responsibilities of fiduciaries include "the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 142-143 (1985). A fiduciary is "personally liable" for any breach of the "responsibilities, obligations, or duties imposed upon fiduciaries" by Title I, § 409(a), 29 U.S.C. § 1109(a). The fiduciary is also barred from causing the plan to engage in certain "prohibited transactions," § 406(a), 29 U.S.C. § 1106(a), and from engaging in other prohibited transactions involving self-dealing or conflict of interest. See § 406(b), 29 U.S.C. § 1106(b). Several remedial provisions provide broad rights of action to both private parties and the Secretary of Labor against errant plan fiduciaries. See, *e.g.*, § 502, 29 U.S.C. §§ 1132.

The statute succinctly provides three ways to become an ERISA fiduciary. First, the plan instrument must provide for at least one "named fiduciary." See § 402(a), 29 U.S.C. § 1102(a). Second, the plan instrument may authorize named fiduciaries to designate other persons to carry out certain fiduciary responsibilities under the plan. See § 405(c)(1)(B), 29 U.S.C. § 1105(c)(1)(B). Persons so designated are deemed to be fiduciaries under ERISA. See § 3(21)(A), 29 U.S.C. § 1002(21)(A).

Third, and most broadly, ERISA contains a functional definition of fiduciary status. See § 3(21)(A), 29 U.S.C. § 1002(21)(A). Even if a corporation or an individual is not named or specifically designated as a fiduciary, that corporation or individual functionally will take on fiduciary status:

> to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

§ 3(21), 29 U.S.C. § 1002(21). By defining ERISA fiduciaries functionally, Congress "expand[ed] the universe of persons subject to fiduciary duties — and to damages — under section 409 [29 U.S.C. § 1109]." *Mertens*, 113 S. Ct. at 2071.

This broad functional definition of fiduciary status cuts through the labels in corporate structures. For example, members of a board of directors of a corporation are treated as fiduciaries to the extent that their activities fall within Section 3(21). See 29 C.F.R. § 2509.75-8, D-4 (1994); *Martin* v. *Harline*, 15 E.B.C. (BNA) 1138 (D. Utah 1992); *Newton* v. *Van Otterloo*, 756 F. Supp. 1121, 1132 (N.D. Ind. 1991). Indeed, an officer of a corporation that is a named fiduciary of a plan may, in acting for the corporation, also be regarded as a fiduciary individually. Compare *Confer* v. *Custom Eng'g Co.*, 952 F.2d 34 (3d Cir. 1991) (corporate officer not a fiduciary individually), with *Kayes* v. *Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir. 1995) (corporate officer who acts in a fiduciary capacity may be held liable individually as a fiduciary).

ERISA's distinction between fiduciary and nonfiduciary status is the essential guide for parties dealing with pension plans, such as the members of NAREIM. For example, an investment firm may be appointed by a named fiduciary to serve as an "investment manager" of the assets of the plan. See § 402(c)(3), 29 U.S.C. § 1102(c)(3). An investment manager under ERISA is a fiduciary with power over plan assets, which is registered as an investment advisor under the Investment Advisers Act of 1940, or is a bank or insurance company, and which has acknowledged in writing its fiduciary status. See § 3(38), 29 U.S.C. § 1002(38). Due to the functional definition of a fiduciary under ERISA, however, the possible extent of fiduciary status is not limited to the corporate entity appointed investment manager. Thus, other corporate entities, individuals affiliated with the investment manager, and even the shareholders are charged under ERISA with knowing that if they act as fiduciaries, they must both meet the obligations of and be subject to liability as fiduciaries.

The practical implications of the distinction between fiduciary and nonfiduciary status are substantial. For example, in an investment relationship that is not governed by ERISA, the parties may define the standard of care by contract and agree to exculpation (on a showing of good faith, or absent proof of negligence) as to the performance of the investment. Under ERISA, however, an investment manager is held to a very high statutory standard of care, § 404(a)(1), 29 U.S.C. § 1104(a)(1), which cannot be varied by the parties, and exculpation of an investment manager is void as against public policy. § 410(a), 29 U.S.C. § 1110(a); see *Kayes*, 51 F.3d at 1460.

Furthermore, even if the investment manager's conduct satisfies ERISA's standard of care generally, under ERISA the investment manager still must comply with the statute's highly detailed prohibited transaction rules (§ 406(a), 29 U.S.C. § 1106(a)), which bar fiduciaries from causing the

plan to enter into investments that directly or indirectly involve parties in interest.[7] In addition, a fiduciary may be liable for breaches committed by cofiduciaries. Implementing procedures to comply with ERISA's stringent rules and purchasing fiduciary liability insurance to protect against inadvertent violations of ERISA increase the operating costs of investment managers. Thus, there are very tangible reasons for investment managers, and the corporations and individuals related to them, to understand precisely when they are deemed to be fiduciaries subject to fiduciary liability under ERISA and when they are not.

Until now, that guidance has been provided by the clear statutory language of ERISA and by more than 20 years of interpretation of that language by the Department of Labor and the courts. The decision below would introduce massive confusion by imposing liabilities on nonfiduciaries that are equivalent to those that fiduciaries have assumed expressly.

B. ERISA's Fiduciary-Nonfiduciary Distinction Would Be Rendered Meaningless By Inferring A Cause Of Action For Veil-Piercing To Reach Nonfiduciaries

Respondent brought this suit under ERISA to require petitioner, a nonfiduciary, to satisfy a judgment rendered against Tru-Tech, a fiduciary. Respondent did not premise his claims against petitioner on a theory that sought equitable relief, under § 502(a)(3), 29 U.S.C. § 1132(a)(3), against a nonfiduciary for knowing participation in a fiduciary breach.

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[7] A very recent prohibited transaction exemption proposed by the Department of Labor illustrates the complexity of administering the investment activities of pension plans in compliance with the prohibited transaction rules. The Labor Department noted, as part of the grounds for proposing the retroactive exemption, that the General Motors plans currently have 1,375 entities that are parties in interest with respect to the plans. 60 Fed. Reg. 33,861, 33,863 (June 29, 1995).

Thus, the viability of such an action under Section 502(a)(3), a question that this Court reserved in *Mertens*, 113 S. Ct. at 2067-2068, is not directly presented here. Instead, the Fourth Circuit devised a federal common law rule of liability with no specific foundation in ERISA. This Court has stated a strong presumption against inferring new causes of action or remedies within ERISA. *Russell*, 473 U.S. at 146-148; *Mertens*, 113 S. Ct. at 2067. The Court should be particularly reluctant to infer liability against the nonfiduciary here, where the result would undercut ERISA's fundamental distinction between fiduciaries and nonfiduciaries.

1. The Fourth Circuit's Reasoning Lacks Support in the Statute

The Fourth Circuit did not attempt to locate a specific relevant source of nonfiduciary duty in ERISA or a cause of action in the language of the statute. Rather, the court of appeals appears to have relied entirely on ERISA's general purpose of protecting employee benefits as the basis for a new common law rule imposing liability on nonfiduciaries. Under ERISA, however, "vague notions of a statute's 'basic purpose' are * * * inadequate to overcome the words of its text regarding the specific issue under consideration." *Mertens*, 113 S. Ct. at 2071.

The Fourth Circuit did not explicitly acknowledge that it was sanctioning the imposition of fiduciary liability on a nonfiduciary. As a result, the court of appeals did not address the open issue, post-*Mertens*, of the liability of a nonfiduciary under Section 502(a)(3) of ERISA for knowing participation in a fiduciary breach. Accordingly, the court below avoided a confrontation with the post-*Mertens* decisions in three other circuits that have decided against such knowing participation liability of a nonfiduciary. See *Reich* v. *Rowe*, 20 F.3d 25 (1st Cir. 1994) (nonfiduciary accounting service provider); *Reich* v. *Continental Casualty Co.*, 33 F.3d 754, 757 (7th Cir. 1994), cert. denied, 115 S. Ct. 1104 (1995) (nonfiduciary provider of fiduciary liability insurance policy);

Reich v. *Compton*, No. 93-2019, 1995 WL 329911 (3d Cir. June 5, 1995) (nonfiduciary lessee); see also *Buckley Dement, Inc.* v. *Travelers Plan Administrators of Illinois, Inc.*, 39 F.3d 784, 789 (7th Cir. 1994) (nonfiduciary claims administrator).

Instead, the Fourth Circuit relied upon "a liberal veil-piercing standard" (Pet. App. 23a), which the First Circuit had fashioned in *Alman* v. *Danin*, 801 F.2d 1 (1st Cir. 1986), to require the controlling shareholders of an employer to satisfy the corporation's contractual obligation under a collective bargaining agreement to contribute to multi-employer benefit plans. The duty of an employer to contribute to a multi-employer plan pursuant to a collective bargaining agreement is a statutory obligation of the employer under ERISA. § 515, 29 U.S.C. § 1145. But the employer takes on no greater duty under ERISA than it has assumed contractually in bargaining to contribute to the multi-employer plan. In contrast, a corporate fiduciary takes on specific statutory duties of care, solely because of the corporation's status as a fiduciary under ERISA. Given these distinctions under the structure of ERISA, it was plainly inappropriate to follow *Alman* and import veil-piercing notions here.

2. Without More, This Court Should Not Infer a New Cause of Action from ERISA

There is a strong presumption against federal courts creating new causes of action or remedies within ERISA. *Mertens*, 113 S. Ct. at 2067. "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Russell*, 473 U.S. at 147 (quoting *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 97 (1981)). There is no doubt that ERISA is the prototypical "comprehensive and reticulated" statute. *Mertens*, 113 S. Ct. at 2066 (quoting *Nachman Corp.* v. *PBGC*, 446 U.S. 359,

361 (1980)).[8] As much as the Fourth Circuit struggled (for jurisdictional reasons) to characterize the action against petitioner as simply piggybacking on an underlying ERISA claim (Pet. App. 12a), the reality is that the creation of a new veil-piercing cause of action runs afoul of the presumption that Congress deliberately omitted the cause of action in the first place, without offering any justification for doing so.

There are very strong reasons not to buck this presumption. First, ERISA is the result of a delicate balancing of competing interests by Congress. Although the purpose of ERISA is to protect the security of employees, Congress had to engage in "certain cost-benefit analyses * * * in order to fashion a comprehensive regulatory scheme." *Rowe*, 20 F.3d at 32. One key legislative decision was to define carefully the obligations, and the causes of action to enforce those obligations, associated with "increasing the number of fiduciary parties and the scope of fiduciary responsibility." *Id.* at 32-33. This was Congress' chosen method of "containing pension costs," *Mertens*, 113 S. Ct. at 2072, and meeting the stated objective of preserving "the soundness and stability of plans with respect to adequate funds to pay promised benefits." § 2(a), 29 U.S.C. § 1001(a). Allowing an implied cause of action vitiating ERISA's fundamental distinctions between fiduciaries and nonfiduciaries would upset the balance crafted by Congress.

Second, the costs associated with such a substantial expansion of ERISA-based liability are great. As one pension

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[8] The remaining components of the statutory scheme are tightly woven: "carefully integrated" civil enforcement provisions, § 502, 29 U.S.C. § 1132; *Russell*, 473 U.S. at 146; "clearly expansive" preemptive powers, § 514, 29 U.S.C. § 1144; *New York State Conference of the Blue Cross & Blue Shield Plans* v. *Travelers Insurance Company*, 115 S. Ct. 1671, 1677 (1995); and a complex regulatory system in Title IV governing plan terminations.

expert told the Senate Finance Committee's Subcommittee on Pension Plans during the consideration of ERISA:

> Unless this system [of liability for breaches of fiduciary duty] is developed with the utmost care, fiduciaries will avoid exercising initiative, judgment, individual responsibility, or similar subjective attention to individual plan management. The essential element of the private system — flexibility — will be compromised. Undue conservatism will be encouraged — to the detriment of the employees, the employer, and the economy as a whole.

Private Pension Plan Reform: Hearings Before the Subcommittee on Private Pension Plans of the Senate Comm. on Finance, 93rd CONG., 1ST SESS. 671-672 (1973) (statement of John S. Nolan).

Unfortunately, the Fourth Circuit ignored this warning. Rather than grapple with the language of the statute, the court of appeals heaped a daunting expansion of common law liability atop the shaky base of the general protective purposes of the statute. But as the Ninth Circuit observed in criticizing similar attempts under ERISA in the pre-*Mertens* era, they "have built very much on very little." *Nieto* v. *Ecker*, 845 F.2d 868, 872 (9th Cir. 1988). See also *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (rejecting the vice of "simplistically * * * assum[ing] that whatever furthers the statute's primary objective must be the law"). Such a practice makes ERISA liabilities wholly unpredictable, and the numerous industries that rely upon a clear understanding of the statute require a more stable legal environment in which to operate. To be sure, Congress intended the federal courts to have the power to develop a common law of ERISA, at least interstitially, see *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989), but the courts should "incorporate a given trust law principle [only] if the statute's text negates an inference that the principle was omitted deliberately from the statute." *Useden* v. *Acker*, 947

F.2d 1563, 1581 (11th Cir. 1991); accord *Rowe*, 20 F.3d at 32.

Third, ERISA already contains many provisions in which Congress explicitly disregarded the corporate form in order to further the statutory purposes. In addition to the functional definition of fiduciary, the highly technical rules applicable to transactions with parties in interest (§ 3(14), 29 U.S.C. § 1002(14)) determine whether transactions with shareholders of fiduciaries are, or are not, prohibited. § 406(a), 29 U.S.C § 1106(a). Congress also concluded that certain provisions of part 2 of Title I of ERISA, establishing minimum participation, vesting and benefit accrual standards, should be applied as if all corporations and all trades or businesses under common control were a single employer. §§ 210(c), (d), 29 U.S.C. §§ 1060(c), (d). Similarly, Congress chose to disregard the corporate form in certain funding provisions of part 3 of Title I of ERISA, specifically providing joint and several liability on all members of a controlled group of trades or businesses for funding obligations (§ 302(c)(11)(B), 29 U.S.C. § 1082(c)(11)); imposing a lien for failure to fund on the property of all members of such a controlled group (§ 302(f), 29 U.S.C. § 1082(f)); and considering the financial condition of all members of such a controlled group for purposes of providing variances from the minimum funding requirements for substantial business hardships (§ 303(d)(2), 29 U.S.C. § 1083(d)(2)).[9] The detailed attention that

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[9] Title II of ERISA amended the Internal Revenue Code to incorporate many of the substantive provisions of Title I of ERISA. Sections 414(b) and 414(c) of the Code impose controlled group principles for selected provisions relating to certain tax qualified employee benefit plans. 26 U.S.C. §§ 414(b)-414(c). Certain provisions in Title IV of ERISA similarly apply specifically to all trades or businesses under common control, including the obligation to pay premiums to the Pension Benefit Guaranty Corporation (§ 4007(e)(2), 29 U.S.C. § 1307(e)(2)); the ability to engage in a

Congress gave to recognizing or disregarding the corporate form throughout ERISA belies the conclusion that Congress intended the courts to devise a liberal veil-piercing standard of general applicability.

Imposing liability on a nonfiduciary controlling shareholder also would produce, in practice, a contorted result that is inconsistent with the structure of ERISA. The trustees must have "exclusive authority and discretion to manage and control the assets of the plan." § 403(a), 29 U.S.C. § 1103(a). However, the trust may delegate to an asset manager the authority to manage, acquire or dispose of plan assets. § 403(a)(2), 29 U.S.C. § 1103(a)(2). If this authority is delegated to an investment manager, the controlling shareholder of the investment manager takes on fiduciary duties and fiduciary liability only if he agrees to become a fiduciary or acts in fact as a fiduciary. But, if the "liberal veil-piercing standard" of the Fourth Circuit is adopted (Pet. App. 23a), the controlling shareholder may be subject to veil-piercing liability even if he has been careful to refrain from acting as a fiduciary, due to his nonfiduciary conduct of the business of the corporation. Thus, controlling shareholders, confronted with the threat of liability under a liberal veil-piercing standard, perversely may be able to protect themselves against liability under ERISA only by becoming more deeply involved in the corporation's fiduciary activities. Whether the controlling shareholder is capable of performing as a skilled fiduciary becomes less relevant than responding to this imperative. The carefully articulated delegation of authority permitted under ERISA thus may become skewed by

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distress termination under § 4041(c)(2), 29 U.S.C. § 1341(c)(2); reportable events under § 4043(a), 29 U.S.C. § 1343(a); liability with respect to plan terminations and withdrawals, §§ 4062-4064, 29 U.S.C. §§ 1362-1364; and the lien imposed by § 4068, 29 U.S.C. § 1368.

the foreign pressures of defending against veil-piercing liability.

C. Veil-Piercing To Impose Liability On A Nonfiduciary Is Inconsistent With ERISA's Functional Definition Of A Fiduciary

The functional definition of a fiduciary in Section 3(21) of ERISA is an explicit and dynamic statutory mechanism for attributing fiduciary responsibility to the true, behind-the-scenes wielders of power over a plan. It is therefore protective: if the "named" fiduciary really is acting as a fiduciary in name only, the functional definition pins fiduciary duties — and thus personal liability — upon additional parties. In this way, the functional definition functions very much like the common law doctrine of veil-piercing, placing substance over form.

However, veil-piercing analysis differs from the functional ERISA analysis in such a way that it would be anomalous to use veil-piercing to impose fiduciary liability on an individual (such as petitioner) who has already been found to be a nonfiduciary under ERISA. Though procedurally similar, the two analyses differ in substance. Veil-piercing is a traditional state-law method of assigning substantive liability against a person or entity when that person or entity exercises such complete control over a corporation that the corporate form is adjudged to be a sham. See Pet. App. 11a. By contrast, the analysis required by ERISA looks beyond issues of general corporate control to the particular type of control specified in Section 3(21) as triggering fiduciary duties. This factual link to plan assets and affairs is essential to describing an ERISA cause of action, because fiduciary duties and obligations make sense only in terms of their relation to a plan.[10] In other words, it makes perfect sense to have situa-

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[10] That is why the factors analyzed in veil-piercing cannot generate ERISA liability; they are all cast in reference to *corporate*,

tions in which a shareholder would be considered a fiduciary under ERISA even though it would be inappropriate to pierce the corporate veil to impose other corporate liabilities. But it confuses the purposes of the statute and compromises its integrity to employ veil-piercing to impose personal liability on a controlling shareholder — who, by virtue of his behavior, has *not* triggered any fiduciary duties and obligations — and to call that liability ERISA liability.

The Fourth Circuit considered the argument that veil-piercing should not be substituted for ERISA's functional fiduciary analysis but dismissed it in a short footnote. See Pet. App. 19a n.14. The court of appeals observed that "[t]he tests for ERISA fiduciary liability and veil-piercing are not identical," and it stressed that "most of the activity leading to the conclusion of veil-piercing occur[red] *after* the activity pursuant to which the corporation [was] deemed to have breached its ERISA fiduciary duties." *Ibid.* But this statement hardly explains why it is appropriate to superimpose a court-made veil-piercing theory on top of the fiduciary analysis adopted by Congress, much less why ERISA's functional analysis could not simply have been applied to the changed factual picture that existed at the time of the enforcement action. Simply stated, the relevant status under ERISA is that of a fiduciary, and liability should follow only if a person is named or functions as a fiduciary.

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not plan, affairs — *e.g.*, undercapitalization of the corporation, failure to observe corporate formalities, siphoning of the corporation's funds by the dominant shareholder, non-functioning of corporate officers and directors, and commingling of personal and corporate assets. See generally 1 William M. Fletcher, Fletcher Cyclopedia of the Law of Corporations § 41.30 (perm. ed. rev. vol. 1990).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The Supreme Court of the United States

October Term, 1995

D. Grant Peacock,
Petitioner,
v.
Jack L. Thomas,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS IN SUPPORT OF RESPONDENT

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

No. 94-1453

D. GRANT PEACOCK,
Petitioner,
v.
JACK L. THOMAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

Central States Pension Fund

Central States, Southeast and Southwest Areas Pension Fund is a multiemployer defined benefit pension trust fund established in 1955 by affiliates of the International Brotherhood of Teamsters and by various employer associations pursuant to section 302(c)(5) of the Labor Management Relations Act (LMRA). The Pension Fund

is governed by a Board of Trustees consisting of an equal number of union and management appointees (four of each). The trustees are plan fiduciaries within the meaning of Section 3(21)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(21)(A). The Pension Fund is administered for the exclusive benefit of the participants to whom the Trustees owe an undivided duty of loyalty. The purpose of the Pension Fund is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the Central States pension plan. Central States Pension Fund is the largest multiemployer pension plan in the country. *Central States v. Central Transport, Inc.*, 472 U.S. 559, 561, n.1, 105 S.Ct. 2833, 2386, n.1 (1985). Its current assets exceed $12.3 billion and the present value of its liabilities for vested benefits is approximately $14.5 billion. Participating employers contribute to the Pension Fund pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees. The Pension Fund covers 170,000 retirees presently drawing benefits and 220,000 active participants of approximately 5,000 contributing employers.

Central States Health and Welfare Fund

Central States, Southeast and Southwest Areas Health and Welfare Fund was established in 1950. It provides health and welfare benefits to eligible employees of contributing employers that are signatory to collective bargaining agreements with local unions affiliated with the International Brotherhood of Teamsters. Like the Pension Fund, the Health and Welfare Fund is governed by a Board of Trustees consisting of four management and four union-appointed trustees, who are plan fiduciaries within the meaning of ERISA.[1] The Health and Welfare

[1] The two funds are jointly administered under the direction of the same eight-member Board of Trustees. The Funds will hereafter be referred to collectively as Central States or individually as the Pension Fund and the Health and Welfare Fund.

Fund has net assets of more than $130 million and provides benefits to more than 125,000 active participants, as well as over 20,000 retirees and their families.

Interests of Central States

As of July 31, 1995, Central States' in-house legal department had 137 active delinquent contribution litigation files and the Pension Fund had 165 withdrawal liability files. To reduce costs, virtually all delinquent contribution and withdrawal liability litigation is filed in the District Court for the Northern District of Illinois, where Central States has its offices, and is handled by attorneys of Central States' law department. Delinquent contribution suits filed by Central States resulted in collections totalling $11,270,911 in 1993, $15,650,413 in 1994 and $6,402,343 through July 1995. Withdrawal liability cases have resulted in collections totalling $25,687,644 in 1993, $24,732,359 in 1994 and $8,821,887 through July 1995.

In approximately half of the cases filed by Central States, all or part of the balance owed is uncollectible because the employing entity is insolvent. In these cases, Central States invariably attempts to determine whether there are any individuals or entities that may also be responsible for the liability under various "common law" theories, including the piercing the corporate veil involved in this case.[2] If, as the Petitioner contends, these cases are governed by state law, the likelihood of prevailing will significantly decrease because recovery will depend upon the vagaries of state law rather than a uniform federal standard. Further, Central States litigation costs

[2] *See e.g. Central States Pension Fund v. Sloan*, 902 F.2d 593 (7th Cir. 1990) (labor law alter ego theory); *Central States Pension Fund v. Minneapolis Van Co.*, 764 F.Supp. 1289 (N.D. Ill. 1991); *Central States Pension Fund v. Goldstein*, 1995 WL 221848 (N.D. Ill. April 11, 1995) (piercing corporate veil); *Central States Pension Fund v. Central Transport, Inc.*, 1994 WL 692726 (N.D. Ill. Dec. 1, 1994).

will substantially increase because ERISA's fee shifting provision (29 U.S.C. § 1132(g)) will not apply and Central States will be required to retain outside counsel in numerous different states to handle such litigation.

Because all of Central States' assets are used to provide benefits to participants and defray administrative expenses, 29 U.S.C. § 1104, the burden of these additional costs and lost revenue will be borne by participants and beneficiaries in the form of lower benefit payments and eventually, if benefit levels are to be maintained, upon other participating employers. To further the congressional goal of protecting the "soundness and stability of plans with respect to adequate funds to pay promised benefits," 29 U.S.C. § 1001, it is important that a federal forum is available to resolve insider liability cases. Since this case implicates Central States' ability to collect amounts that it is owed, Central States has a significant interest in the result of this case.

SUMMARY OF ARGUMENT

1. Petitioner challenges whether a federal court may impose a judgment on an alter ego of an ERISA judgment debtor by piercing the corporate veil under federal common law. (Question 1.) As a starting proposition, however, there is nothing peculiar about a federal cause of action that involves piercing a corporate veil. Assuming that the federal district court has subject matter jurisdiction over the cause of action, the veil-piercing aspect of the case simply goes to the true identity of the liable entity. Petitioner argues, however, that under the facts of this case this veil piercing is really a state-law question and is, in any event, foreclosed by ERISA's specification of remedies against fiduciaries. But this argument is really just a threshold for Petitioner's Question 2, which attacks federal jurisdiction. Amici are concerned that the jurisdictional question not overshadow and inadvertently obscure critical ERISA questions, such as whether an ERISA plaintiff can plead a federal cause of action against

an alter ego of an ERISA defendant. Petitioner's first argument would sweep away any remedy against an alter ego that is imposed by application of federal common law. Such a ruling would cripple ERISA enforcement by plans like Amici and would invite fraud by alter egos.

In an ERISA plan's action against an employer, the question of who is the employer is a federal question. If the employer has an alter ego, then the alter ego *is* the employer—the same employer—notwithstanding its adoption of an alternate identity. The mechanism for reaching the alter ego is to "pierce the corporate veil," a common law concept. Should federal courts be barred from "federalizing" the common law to answer the underlying federal question? Not under this Court's general precedents. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24, 103 S.Ct. 2841, 2854 n. 26 (1983). So the question is whether, as a matter of federal judicial policy, veil piercing should be treated differently and left as a state law matter. The need for uniform application of ERISA ought to answer that question. The question of the *identity* of the ERISA employer is one of the most common under ERISA, therefore plans should not be forced to deal with the disparate common law rules of the states to answer this question. If the federal courts refuse to consider the question of the true identity of a party who is responsible for an obligation created under federal statute, the courts will be abandoning a large part of the judicial function.

Nor does the fact that ERISA provides remedies against fiduciaries some how trump the federal common law. Petitioner argues that ERISA provides an exclusive veil piercing remedy directly against a fiduciary. This is plainly wrong as there is no veil piercing—no determination that one party is identical to another—involved in ERISA's fiduciary rules. Corporations or individuals may be fiduciaries based on objective criteria. The fact that fiduciaries may also be alter egos for another entity does not

make the ERISA fiduciary rule a veil piercing statute. The alter ego status is independent of the fiduciary status.

In this case, Petitioner was held not to be a direct fiduciary under the fiduciary rules. That is, Petitioner's job did not directly involve acting as a fiduciary. But the corporation was held a fiduciary under those rules, and Petitioner is an alter ego of the corporation. He is thus the same entity, for this case, as the corporation and is liable as the corporate fiduciary. Petitioner's argument to the contrary is perverse—that the fiduciary rules should shield an individual from liability for his fiduciary breach as an alter ego. This is plainly a desperate argument as Petitioner stretches to reach his jurisdictional question, and this Court should reject it.

2. Petitioner's jurisdictional attack must also fail. (Question 2.) The court below held that the district court had "ancillary" jurisdiction over a second lawsuit to collect from the alter ego of the judgment debtor in an earlier action. It held it had inherent jurisdiction over its own judgment and further that the second action arose from the same claim as the original action. Petitioner argues that as a state law action (assuming it wins on Question 1), the second case is an independent cause of action to pierce a corporate veil. Petitioner misstates the cause of action. It is really a cause of action to collect an ERISA liability from a fiduciary. The Petitioner is the true fiduciary not because he directly assumed a fiduciary position, but because he dominated and manipulated the corporation that acted as the direct fiduciary. That Petitioner became the liable fiduciary by virtue of his being an alter ego does not change the nature of the cause of action as an ERISA claim. Thus the district court had original jurisdiction of this case under ERISA and there is no need to invoke ancillary jurisdiction. But in any event the claim against the corporation and that against its alter ego arose out of the same Article III case or controversy and thus easily fit within the court's supplemental jurisdiction under 28 U.S.C. § 1367.

ARGUMENT

I. AN ERISA CAUSE OF ACTION AGAINST AN ALTER EGO OF AN ERISA DEFENDANT MAY EMPLOY FEDERAL COMMON LAW TO PIERCE THE CORPORATE VEIL.

To the extent that Petitioner argues that any action to pierce a corporate veil is a state law cause of action, not subject to federal jurisdiction, Petitioner is plainly wrong. One of the commonest ERISA causes of action, for example, is one brought by an employee benefit plan—such as Central States—to collect contributions owed by an employer under 29 U.S.C. § 1145. Section 1145 makes the contractual duty to contribute to a multiemployer plan a statutory obligation by providing that "[e]very employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall . . . make such contributions in accordance with the terms and conditions of such plan or such agreement." 29 U.S.C. § 1145. Often the employer is a corporation but this is not necessarily so since ERISA defines the term "employer" expansively.

> The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(5). If it is appropriate to pierce the corporate veil, the individual shareholder is the ERISA "employer" and is obligated under § 1145 to pay the contributions. This is an ERISA cause of action.[3]

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[3] Likewise a participant's claim against the corporate employer for an ERISA benefit may also seek to pierce the corporate veil to reach the corporation's parent. For example, in *Lumpkin v. Envirodyne Industries, Inc.*, 933 F.2d 449 (7th Cir. 1991), the court held that beneficiaries stated an ERISA claim by alleging

> [The] Plans fear that a literal reading of § 1145 would not permit corporate-veil piercing. . . . We do not think this is so. When state law pierces the corporate veil, where the owner is the corporation's alter ego, where state or other relevant federal law makes the owner liable, it is fairly easy to say that the owner *is* the corporation. and that the owner is therefore an "employer" (under ERISA's definition) "who is obligated" (under state or other relevant federal law) "to make contributions to" a pension plan. Indeed, in such case he is an employer *already obligated* to make contributions.

Massachusetts Laborers Health Fund v. Starrett Paving Co., 845 F.2d 23, 26 (1st Cir. 1988). This is not simply a matter of the application of state law to a federal statute, however. In *Nationwide Mutual Insurance Co. v. Darden*, 112 S.Ct. 1344, 1348 (1992), this Court noted that because the ERISA definition of the term "employer" was "completely circular and explains nothing," it was necessary to adopt a common law test based upon "the general common law of agency, rather than . . . the law of any particular State." *Id.* n.3, quoting, *Community for Creative Non-Violence v. Reich*, 490 U.S. 730, 740, 109 S.Ct. 2166, 2173 (1989).

Indeed, in enacting ERISA, Congress intended that "a body of federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26, 103 S.Ct. 2841, 2854 n.26, 77 L.Ed.2d 420 (1983) *quoting* 120 Cong. Rec. 22942 (1974) (remarks of Sen. Javits); accord *Pilot Life Ins. Co. v. Dedreaux*, 481 U.S. 41, 56, 107 S.Ct. 1551, 1558, 95 L.Ed.2d 39 (1987). Thus, when a plan seeks to hold an individual liable under a piercing the corporate veil

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that the corporate veil of the employer should be pierced and the defendant be held liable for unpaid pension benefits.

theory, federal common law principles must control. Certainly the scope of a term defined in a federal statute should not turn upon each State's law.

Petitioner claims, however, that veil piercing is different and should be left to state law. That may be convenient for Petitioner's jurisdictional arguments, but it makes no sense as ERISA policy, nor does it accord with this Court's decisions. A good starting point (but one overlooked by Petitioner) for answering whether federal common law encompasses veil piercing is this Court's decision in *Anderson v. Abbott*, 321 U.S. 349, 64 S.Ct. 531 (1994). In that case plaintiff obtained a judgment against a bank and then sought to collect the balance of the judgment from the bank's stockholders in separate lawsuits. Noting that the corporation (the bank) limited liability by its form, the Court nonetheless held that federal policies could overcome the limitations of this business form.

> It is of course true that Delaware created this corporation. But the question of liability for these assessments is a federal question. The policy underlying a federal statute may not be defeated by such an assertion of state power. . . . But no state may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy concerning national banks which Congress has announced.

Anderson, 321 U.S. at 365. But this is precisely what Petitioner asks this Court now to do in an ERISA context. As a general principle Petitioner is wrong, and he makes no case for an ERISA exception. Veil piercing is a federal common law matter where the liability of the corporation is created by federal statute. Federal law, applied by the courts in light of the pertinent legislation, must be used to determine whether one party is in fact *identical* to a party who is directly liable for a federal obligation. For example, the traditional state law test

for piercing the corporate veil has emphasized domination and manipulation of the corporation by the shareholder. But which corporate functions must be dominated and manipulated before the corporate veil will be pierced? In light of the underlying ERISA policies, domination and manipulation of the corporation's relationship with its employees appears to be of special (though by no means exclusive) significance. Focusing upon the party who in reality dominated the employment relationship will further the stated ERISA goal of making the "employer" responsible for contributions and withdrawal liability owed to an employee benefit plan. State law concerning the alter ego or veil piercing doctrine cannot be counted on to be sensitive to these same concerns.

Petitioner's sole real hope for an ERISA exception to federal common law veil piercing rests on some rather spurious reasoning. Petitioner argues that ERISA itself provides a mechanism for piercing the corporate veil by imposing fiduciary liability without regard to corporate form. We presume that Petitioner means to argue that by providing one form of remedy Congress meant to exclude all others not specifically allowed. Petitioner's reasoning is flawed.

ERISA's fiduciary rules have absolutely nothing to do with piercing the corporate veil. The term "fiduciary" is defined in 29 U.S.C. § 1002(21)(A). It is defined objectively and without reference to corporations or their alter egos. Likewise the fiduciary duties specified in 29 U.S.C. § 1104 have nothing to do with piercing a corporate veil. ERISA creates these obligations directly, and provides a direct remedy for their breach pursuant to 29 U.S.C. § 1109. There is not the slightest hint that these rules might by their silence shield a nominal non-fiduciary from liability under another theory. Yet Petitioner would have § 1109 shield individuals from the consequences of their ERISA violations if only they are wise enough to set up a corporate veil—regardless of whether that shield is

palpable or legitimate. No legal principle supports such a strained reading of ERISA.

ERISA provides well-defined causes of action. That certain individuals may be fiduciaries (or employers) and subject to liability under ERISA does not shield them, much less other, non-fiduciary individuals from other ERISA causes of action. Here Petitioner is nominally not a fiduciary (i.e., by virtue of his corporate position and duties). But he is an alter ego of the corporate fiduciary and thus is in his individual right the true (albeit indirect) fiduciary—he stands in the shoes of the corporation. And he is liable on that score under § 1109 just as was the corporation.

II. FEDERAL COURTS HAVE JURISDICTION UNDER ERISA OVER A POST-JUDGMENT LAWSUIT TO IMPOSE ERISA LIABILITY ON AN ALTER EGO OF THE JUDGMENT DEBTOR.

Petitioner's Question 2 asks whether the federal courts have subject matter jurisdiction over an action that seeks to impose liability under ERISA, where the liability was previously reduced to judgment against a corporation, and the plaintiff is now asserting it against an alter ego of the judgment debtor. The court below relied upon federal "ancillary" jurisdiction, which is codified at 28 U.S.C. § 1367 as "supplemental" jurisdiction. That statute permits jurisdiction over claims if they are so related to a claim over which the federal court has original jurisdiction that they form part of the same case or controversy (including claims that involve the joinder of additional parties). Had Petitioner been sued as the employer by virtue of veil piercing as part of the first action, there is no question that the court would have had jurisdiction under § 1367 and under ERISA itself. The only real question is whether the court loses jurisdiction when it enters the first judgment and the alter ego is then sued in a second action. Put that way why should timing of the action be the dispositive factor? The court below

held that the district court had continuing jurisdiction over enforcement of its first judgment and that an action to impose that judgment on an alter ego of the judgment debtor fell within that jurisdiction. Is this, then, jurisdiction under ERISA (as was the original action), or under a court's "inherent" jurisdiction over its judgments, or under ancillary jurisdiction?

Amici curiae believe that this jurisdiction actually stems from the original jurisdiction under ERISA against the corporate fiduciary. There is no cause of action to pierce a corporate veil, but rather a cause of action to impose ERISA liability on a fiduciary (or employer, depending on the ERISA obligation) who happens to be a fiduciary solely because of its status as an alter ego of an entity that was itself held to be a fiduciary. The alter ego allegation is, in a sense, "ancillary" because it adds an element not expressly found in the statute, but this does not make it an ancillary claim for purposes of § 1367. Of course, the ERISA liability had already been established against the corporation. Petitioner is wrong, however, to characterize the second action solely in terms of the alter ego allegations as if this makes it a non-ERISA claim. The alter ego case is still an ERISA claim against the employer/fiduciary—in its individual (rather than corporate) form. The already adjudicated ERISA claim was a necessary element of the action against the alter ego, thus making it an ERISA action.

Petitioner argues that the alter ego action is just a procedural device in aid of execution like a garnishment. That is a false analogy. An alter ego action is one to clarify the *identity* of the judgment debtor for purposes of execution on a judgment. This is obviously a substantive part of the ERISA claim (establishing liability against an entity), not a collection procedure. *See Anderson v. Abbott*, 321 U.S. 349, 64 S.Ct. 531 (1944). In *Anderson*, jurisdiction over the post-judgment action to pierce the corporate veil derived from the federal banking laws.

Likewise ERISA provides the jurisdiction for a post-judgment action to collect ERISA liability from an alter ego.

CONCLUSION

This Court should affirm the court below. Specifically this court should hold that piercing the corporate veil to impose ERISA liability on an alter ego is governed by federal common law. Further the Court should hold that ERISA provides jurisdiction for a post-judgment action against an alter ego of an ERISA judgment debtor because the liability asserted against the alter ego is the same ERISA liability, and the alter ego is (as a matter of federal common law veil piercing) the same ERISA defendant, as the judgment debtor albeit in individual form.

Respectfully submitted,

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No. 94-1453

IN THE

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D. GRANT PEACOCK,
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v.

JACK L. THOMAS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than 32 million persons, age 50 or older, working or retired, that is dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy and service to enhance the quality of life for all by promoting independence, dignity and

purpose. As a method of promoting independence, AARP attempts to foster the economic security of individuals as they age. Through educational and advocacy efforts, AARP seeks to increase the availability, security, equity, and adequacy of private and public pension plans.

Since 1985, as part of its advocacy efforts, AARP has filed numerous briefs in the federal district and appellate courts and in the U.S. Supreme Court on behalf of older workers and retirees concerning employment and benefits under the Employee Retirement Income Security Act (ERISA) and the Age Discrimination in Employment Act (ADEA). In 1993, AARP established its Pension Equity Project to advocate for security and equity in retirement benefits and to educate the public about the need for greater safeguards in the pension system.

The National Employment Lawyers Association (NELA) is a voluntary organization, founded in 1985, of over 2,300 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership organization comprised of lawyers who represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other

employment-related matters. NELA has devoted itself to supporting precedent-setting litigation remedial legislation affecting the rights of individuals in the workplace.

AARP and NELA are qualified to brief this Court on the implications of the decision in this case, having participated as *amicus curiae* in numerous cases involving ERISA and other employment laws, including *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 114 S.Ct 517 (1993), and the leading decision on ERISA benefit claims, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

AARP's members, NELA members' clients, and other older Americans depend on the protections that ERISA, 29 U.S.C. § 1001 *et seq.*, imposes on private employer-sponsored employee benefit plans. In particular, ERISA's protections, and the ability to enforce these protections, are of vital concern to older workers and retirees, since the quality of their lives in retirement depends heavily on their receipt of pension benefits. Indeed, individuals who receive pensions are less likely to fall into poverty than those who do not.[1/] And, those individuals who receive pensions are

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[1/] AARP's Public Policy Institute's Tabulations of the March 1994 Current Population Survey.

more likely to be in higher income brackets (and thereby more comfortable in retirement) than those individuals who do not.[2] The Court of Appeal's decision in this case not only protects the rights of retired and working Americans in their pension plans, but also preserves the federal court's power and authority.

Because a large number of AARP's 32 million members and NELA members' clients are pension plan participants who must be assured that they can enforce judgments adjudicating ERISA rights, AARP and NELA have a substantial interest in the resolution of the issues herein. The decision in this case will have a direct and vital bearing on the economic security of AARP's members, NELA members' clients and other older Americans.

In light of the significance of the issues presented by this case, AARP and NELA respectfully submit this brief *amici curiae*.[3]

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[2] S. Grad, INCOME OF THE POPULATION AGE 55 OR OLDER, 1992, Table V.C.2, p. 76 (U. S. Department of Health and Human Services, Social Security Administration, Office of Research and Statistics, May 1994).

[3] The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

BACKGROUND

It is important to step back and look at what this case is really about. Quite simply, after having its rights adjudicated during a trial and reviewed by a court of appeals, a defendant consciously chose to take unscrupulous actions to evade the court's judgment. The facts of this case warrant emphasis because of respondent's derision of the court's power and authority.

Respondent, Jack L. Thomas, on behalf of himself and others similarly situated, brought a lawsuit against Tru-Tech, Inc. and D. Grant Peacock, alleging various breaches of fiduciary duties. After a bench trial, the district court held that Petitioner Peacock, based on his status as director and officer without more, was not a plan fiduciary. However, the court also held that Tru-Tech was a plan fiduciary that had committed breaches of fiduciary duties. The court awarded the class of plan participants $187,628.93. *Thomas v. Tru-Tech, Inc.*, No. 87-2243-3, 1988 U.S. Dist. LEXIS 15929, at *19-22 (D.S.C. Nov. 28, 1988). Upon appeal, the Fourth Circuit affirmed the district court in all respects. *Thomas v. Tru-Tech, Inc.*, 900 F.2d 256 (4th Cir. 1990).

Subsequently, Respondent Thomas brought a lawsuit

against Petitioner Peacock, individually, in order to collect the *Thomas* judgment.[4] The uncontroverted evidence in this case showed that Petitioner Peacock, consciously and deliberately after receiving advice of counsel, took evasive actions "to defeat collection of the *Thomas* judgment." *Thomas v. Peacock*, No. 7:91-3843-21, 1992 U.S. Dist. LEXIS 18749, at *19 (D.S.C. Oct. 28, 1992). Such actions included: moving various accounts receivable from Tru-Tech to another corporation solely owned by Petitioner Peacock; moving other accounts receivable from Tru-Tech to Petitioner Peacock's private trust; payment of Tru-Tech assets to a corporation solely owned by Petitioner Peacock even though this receivable had been "written off;" and moving other accounts receivable from Tru-Tech to a corporation solely owned by Petitioner Peacock. In addition, Petitioner Peacock continued to direct Tru-Tech's affairs after resigning from its Board of Directors. Based on these unscrupulous actions, the district court found that "Peacock failed to observe the traditional corporate format and engaged in a 'corporate strategy" with the 'specific

[4] Although the lawsuit also named Petitioner Peacock's attorney, Alan H. Finegold, as a defendant, the court rejected the claims against Mr. Finegold. *Thomas v. Peacock*, No. 7:91-3843-21, 1992 U.S. Dist. LEXIS 18749, at *16 (D.S.C. Oct. 28, 1992).

intent and purpose . . . [of] siphon[ing] off [Tru-Tech's] assets to favored creditors owned or controlled by Peacock and to defeat collection of the *Thomas* judgment." *Id.* The court held that because of his evasive and unscrupulous actions, Petitioner Peacock was liable for the *Thomas* judgment. *Id.* at *36-38.

The Fourth Circuit affirmed the district court's ruling, accepting its findings of facts, but applied somewhat different reasoning. *Thomas v. Peacock*, 39 F.3d 493 (4th Cir. 1994). The Fourth Circuit recognized that corporate veil-piercing is an equitable means of imposing a preexisting liability upon an entity not otherwise liable. *Id.* at 499. The court specifically rejected Petitioner's argument that *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), foreclosed this action against him. Instead, the Fourth Circuit held that although *Mertens* did not permit actions for monetary damages against nonfiduciaries, this case was not "an independent action for monetary damages against a nonfiduciary, but an equitable attempt to satisfy a previous judgment entered against a fiduciary." *Thomas v. Peacock*, 39 F.3d at 502.

Amici support the Fourth Circuit's holding that defendants may not take deceptive, evasive or fraudulent actions to evade a federal court judgment, including an ERISA judgment. *Amici*

maintain that the federal courts' power and authority permits them to fashion equitable remedies to defeat such actions. Thus, *amici* agree with the Fourth Circuit's conclusion that *Mertens* is inapplicable to this case.

Because the parties and other *amici* have fully briefed other issues before the Court, this brief focuses on the narrow issue of the inapplicability of *Mertens* to this case.[2]

SUMMARY OF ARGUMENT

Mertens does not preclude corporate veil-piercing as a remedy in this case because veil-piercing is a form of "appropriate equitable relief" which courts of equity typically could have used to remedy an injustice, had the corporate form been in existence

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[2] We note that if this Court overrules or distinguishes *H.C. Cook v. Beecher*, 217 U.S. 497 (1910), then the issue of the inapplicability of *Mertens* is moot because ERISA's enforcement scheme set forth in ERISA § 502(a) will not be implicated in this case. *See Kokkonen v. Guardian Life Ins. Co. of America*, 114 S. Ct. 1673, 1676 (1994) ["Generally speaking, we have asserted ancillary jurisdiction (in the very broad sense in which that term is sometimes used) for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent (citations omitted); and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its degrees (citations omitted)".]; *Riggs v. Johnson*, 73 U.S. 166, 167 (1897) ["The jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied."].

at that time. 1 J. Pomeroy, EQUITY JURISDICTION §§ 112 & 171, pp. 119 & 201-02 (5th ed. 1941); *Bangor Punta Operation, Inc. v. Bangor & Aroostook Railroad Co.*, 417 U.S. 703, 713 (1974). Moreover, *Mertens* is inapplicable to this case because this is an action to enforce and vindicate the court's authority and power, not to invoke ERISA's enforcement mechanism. *See Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 833 (1988); *see also Kokkonen v. Guardian Life Ins. Co. of America*, 114 S. Ct. 1673, 1676 (1994); *Riggs v. Johnson*, 73 U.S. 166, 167 (1897).

ARGUMENT

MERTENS DOES NOT PRECLUDE CORPORATE VEIL-PIERCING AS A REMEDY IN THIS CASE.

A. Corporate Veil-Piercing is a Form of "Appropriate Equitable Relief" under *Mertens*.

To the extent that ERISA is implicated in this case in order to enforce the court's judgment, corporate veil-piercing is entirely consistent with *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993).

In answering the question whether a nonfiduciary who knowingly participated in a fiduciary breach was liable to the plan

for losses as a result of such breach, the Court in *Mertens* analyzed whether Congress intended "appropriate equitable relief" to include compensatory damages or monetary relief. *Mertens*, 113 S. Ct. at 2066, 2068. Although the Court concluded that "appropriate equitable relief" under ERISA § 502(a)(3) does not include compensatory damages or monetary relief, it did not fully elucidate what it considered "appropriate equitable relief" to mean except by declaring that:

> 'equitable relief' can also refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus and restitution, but not compensatory damages). [. . . .] [I]t remains a question of interpretation in each case which is intended.

Id. at 2069 (emphasis in original).

Remedies which were typically available in equity also included "restorative" remedies which permitted the plaintiff to be restored to the full enjoyment of his rights or property when such enjoyment had been interfered with or prevented by the wrong-doer; such remedies might remove a legal obstacle to the full enjoyment of the plaintiff's rights. 1 J. Pomeroy, EQUITY JURISDICTION §§ 112 & 171, pp. 119 & 201-02 (5th ed. 1941). Moreover, other remedies could be fashioned in equity where they

were needed "to aid, by whatever relief may be appropriate, in the enforcement of a valid judgment of another court, when its enforcement is hindered or prevented by fraud . . . ." 2 J. Pomeroy, EQUITY JURISDICTION § 919 n. 4, p. 1652 (5th ed. 1941). Thus, corporate veil-piercing is exactly the type of equitable relief[6] which courts in equity typically could fashion.[7] Here, corporate veil-piercing is clearly a restorative remedy because the corporate assets which otherwise would have been available to satisfy the judgment "were siphon[ed] off . . . to

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[6] Other equitable remedies developed by the courts to deal with the inadequacies of the execution process included: nullifying fraudulent transfers by which the judgment debtor renders itself insolvent through the transfer of property for less than its value; J. Friedenthal, M.K. Kane & A. Miller, CIVIL PROCEDURE § 15.7 (2d ed. 1993); using supplementary proceedings in aid of execution including discovery "about assets that have been fraudulently transferred . . . "; Wright and Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3014 (1973); FED. R. CIV. P. 69(a); and imposing a constructive trust in order to prevent unjust enrichment and to restore the status quo; *see, e.g.*, G.T. Bogert, TRUSTS § 77 (6th ed. 1987) ["The court merely uses the constructive trust as a method of forcing the defendant to convey to the plaintiff."]; Scott, LAW OF TRUSTS § 462.2, p. 313 (4th ed. 1989).

[7] That corporations did not exist at the time traditional courts in equity existed is irrelevant. "[Equity] . . . has always preserved the elements of flexibility and expansiveness, so that new [remedies] may be invented, or older ones modified, in order to meet the requirements of every case. . . ." 1 J. Pomeroy, EQUITY JURISDICTION §111, p. 118 (5th ed. 1941).

favored creditors owned or controlled by Peacock and to defeat collection of the *Thomas* judgment." *Thomas v. Peacock*, No. 7:91-3843-21, 1992 U.S. Dist. LEXIS 18749, at *19 (D.S.C. Oct. 28, 1992). And, this Court unfailingly has recognized veil-piercing as a means to equitably remedy fraud and other improprieties.

> Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy. (Citations omitted). In such cases courts of equity, piercing all fictions and disguises, will deal with the substance of the action and not blindly adhere to the corporate form.

Bangor Punta Operation, Inc. v. Bangor & Aroostook Railroad Co., 417 U.S. 703, 713 (1974).[9] *See generally* G.T. Bogert, TRUSTS § 77 (6th ed. 1987); D. Dobbs, *Law of Remedies: Damages-Equity-Restitution* § 51.4 (2d ed. 1993). Indeed, not only does *Mertens* fail to preclude corporate veil-piercing in this case, but it would commend this remedy as being the essence of equitable relief. *Mertens*, 113 S. Ct. at 2069; 1 & 2 J. Pomeroy, EQUITY JURISDICTION, *supra*.

[9] Although some courts use the terms veil-piercing and alter ego interchangeably, they are different, but related, concepts. Corporate veil-piercing permits creditors of the corporation to pierce the corporate shell to hold shareholders liable for corporate debts if they abuse the corporate form to defraud creditors. The alter ego doctrine permits the corporate form to be disregarded where the shareholders and/or corporations themselves disregard the legal separation between entities or proper formalities of the corporate form. *Compare* 1 William M. Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41 with § 41.10 (perm. ed. re. vol. 1990). Both of these concepts, however, achieve the same result - assignment of liability to a third-party for the actions and debts of the corporation. In essence, the third-party stands in the shoes of the corporation.

B. *Mertens* Is Inapplicable to This Case Because This is an Action to Vindicate the Court's Power and Authority.

We find ourselves incredulous that Petitioner intentionally misconstrues both ERISA and this Court's decisions interpreting that statute in an effort to condone his wrong-doing. What is at stake here is a third party's ability to transfer corporate assets from a corporation he solely owns to himself in order to evade a court judgment.[9] The Fourth Circuit properly recognized the significance of this dilemma when it approved the use of corporate veil-piercing to find a third-party who transfers assets to himself

[9] We find it disingenuous that Petitioner Peacock and its *amici* argue that this case has no relationship to the *Thomas* judgment. If Mr. Thomas and the class participants had not won a judgment against Tru-Tech, Petitioner Peacock would not have siphoned off Tru-Tech's assets to prevent satisfaction of the judgment. *See Kokkonen v. Guardian Life Ins. Co. of America*, *supra* at n. 5.

in order to evade a court judgment liable for that judgment. Without such recognition, parties will assail the court's power and authority, and the judicial system will erode.

Mertens does not require the federal courts to relinquish their power and authority in order to prevent fraudulent transfers of assets. *Mertens* focused on the meaning of ERISA § 502(a)(3) and its interrelationship with other sections of ERISA.[10/] Although the Court observed in *Mertens* that "ERISA is a comprehensive and reticulated statute," *id.* at 2066, and discussed the "six carefully integrated civil enforcement provisions" of ERISA § 502(a), *id.* at 2067, *quoting*, *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 146 (1985), it did not confront the manner in which parties may enforce *adjudicated* ERISA rights.

Neither ERISA's statutory language nor ERISA's legislative history focuses on what happens *after* ERISA rights

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[10/] ERISA's statutory language under section 502(a) and its legislative history focus on who may enforce ERISA's provisions and the type of remedies which they may recover. 29 U.S.C. § 1132(a); H.R. CONF. REP. NO. 1280, 93rd Cong., 2d Sess. 326-28 (1974), *reprinted in* 3 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94th Cong., 2d Sess., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 at 4593-95 (1976).

have been adjudicated, that is, enforcement of an ERISA judgment. Indeed, Congress had no reason to do so. Plainly, a mechanism already existed to enforce an ERISA judgment -- the Federal Rules of Civil Procedure and the judicial system.

As recognized by the Fourth Circuit, this Court's decision in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 833 (1988), supports the federal court's exercise of jurisdiction in this action. If this Court were to accept Petitioner's reading of *Mackey*, ERISA judgments would not be collectable in federal court. This reading would lead to the incongruous result that a federal court ERISA judgment must be enforced in state court.

The fact that the judgment in this case adjudicated rights under ERISA is immaterial to the ability of, and necessity for, the district court to vindicate its power and authority. Indeed, it makes no difference under what federal statute the judgment was adjudicated. Where any defendant attempts to evade a judgment, the Federal Rules of Civil Procedure and the judicial system have established equitable remedies to defeat such actions, and they should be used. This Court should not allow Petitioner Peacock

or any other defendant to use ERISA to shield him from his wrongdoing.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit below should be affirmed.

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No. 94-1453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

D. GRANT PEACOCK,
Petitioner,
v.
JACK L. THOMAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE BRICKLAYERS & TROWEL TRADES INTERNATIONAL PENSION FUND AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE BRICKLAYERS & TROWEL TRADES INTERNATIONAL PENSION FUND AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE [1]

The Bricklayers & Trowel Trades International Pension Fund ("IPF") is a multiemployer ERISA[2] plan providing

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

[2] Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.*

pension benefits to workers involved in various construction trades, including bricklaying. The benefits distributed by the IPF are funded by contributions of participating employers, which make such contributions pursuant to the terms of collective bargaining agreements between them and Bricklayer local unions [3] throughout the country. When an employer fails to make required contributions to the IPF, ERISA requires the IPF trustees to make "reasonable," "systematic" and "diligent" efforts to collect those delinquencies.[4]

A significant obstacle faced by the IPF and other Taft-Hartley funds [5] is the abuse of the corporate form by employers in order to place corporate assets beyond the reach of the funds. The IPF has a substantial interest in insuring that when employers attempt to evade their ERISA obligation to pay employee benefit contributions, by ignoring corporate formalities or otherwise perpetrating a fraud upon the beneficiaries of the fund, it continues to have available in ERISA cases the traditional doctrine of "piercing the corporate veil." [6]

INTRODUCTION

A. The IPF And Other Taft-Hartley Plans

The IPF is an ERISA fund administered in Washington, D.C. with over 15,000 participating construction industry employers nationwide. It distributes $40 million each year to over 16,000 beneficiaries. The IPF, like all Taft-Hartley plans, is governed by an equal number of union-

[3] There are 175 such local unions that negotiate collective bargaining agreements.

[4] 41 *Fed. Reg.* 12,740 (1976) (PTE Class Exemption 76-1).

[5] 29 U.S.C. § 186(c)(5).

[6] In light of the IPF's keen interest in the veil piercing issues raised by the second question presented by the Petition for Certiorari, and the IPF's answers to that question, this brief does not address the ancillary jurisdiction question presented by the Petition.

appointed and employer-appointed trustees. There are approximately three million Taft-Hartley pension plans like the IPF,[7] with total assets of approximately $250 million.[8]

B. Congress Puts "Teeth" In ERISA

At the time ERISA was passed in 1974, there were no special provisions addressing collection of employer delinquencies. This problem was (and is) particularly acute for funds like the IPF, many of whose contributing employers are small companies in the construction business, an industry which, as Congress has recognized, is notable for its transitory nature.[9]

Congress amended the statute in 1980 to increase the ability of funds to recoup delinquent contributions. The legislative history reflects that Congress intended that the collection enforcement provisions "should have teeth," because of the "serious problem" created by the failure of employers to "make promised contribution[s] in a timely fashion," which "imposes a variety of costs" on plans. *Carpenters Amended & Restated Health Benefit Fund v. John W. Ryan Constr. Co.*, 767 F.2d 1170, 1173-74 (5th Cir. 1985) (citations omitted).[10] Those

[7] 4 Office of Research & Economic Development, U.S. Dep't of Labor, *Private Pension Plan Bulletin—Abstract of 1991 Form 5500 Annual Reports* 21 (Winter 1995).

[8] AFL CIO, *Pensions in Changing Capital Markets* 50-51 (1993). This $250 million figure does not include the assets of an equal number of health, welfare and similar Taft-Hartley plans, located throughout the United States and faced with the same difficulties in collecting employer delinquencies as pension plans like the IPF.

[9] *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1123 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989).

[10] Quoting staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. 1076, *The Multiemployer Pension Amendments of 1980: Summary and Analysis of Considerations* 43-44 (Comm. Print 1980).

changes included adding section 515 of ERISA ("Every employer who is obligated to make contributions . . . shall . . . make such contributions . . . ."),[11] permitting funds to collect interest and liquidated damages up to 20% of delinquent contributions (or double interest) in court actions (29 U.S.C. § 1132(g)(2)(B) and (C)) and making the award of attorney's fees in favor of the plan *mandatory* in collection cases. 29 U.S.C. § 1132 (g)(2)(D).[12]

C. The Delinquency Problem Faced By Taft-Hartley Funds

The trustees of the IPF have adopted written collection procedures which insure that employers are given an initial opportunity to pay delinquent contributions and, if the delinquent sums are not collected, that the matters are then referred to counsel for action. In 1994, there were approximately 3,200 delinquent IPF employers, and 323 delinquencies in the hands of counsel, of which 86 ultimately had to be litigated. Section 502(e)(2) of ERISA (29 U.S.C. § 1132(e)(2)) provides that the IPF may institute all its collection cases in Washington, D.C. "where the plan is administered," regardless of where the participating employer is located. This provision enables the IPF to bring all such cases in its home judicial district, resulting in a great savings to the plan in court costs and a great tactical advantage in resolving delinquencies in the IPF's home forum.[13]

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[11] 29 U.S.C. § 1145 ("Delinquent Contributions").

[12] This is the only provision in all of ERISA with a mandatory attorney's fees requirement. In all other ERISA Title I actions, attorney's fees are only allowed in the "discretion" of the court. 29 U.S.C. § 1132(g)(1).

[13] Plans have been successful in defeating motions to transfer collection cases from the place where the plan is administered to the district where the employer is located. *See, e.g., Employees Sav. Plan of Mobil Oil Corp. v. Vickery*, 99 F.R.D. 138 (S.D.N.Y. 1983).

For trust funds such as the IPF, there is little difficulty in collecting from employers with ongoing operations. As to those employers, there are assets available for garnishment and execution in the event that they are unable or unwilling to satisfy the judgment. The real problem instead arises when those individuals who control the employer which signed the collective bargaining agreement abuse the corporate form, or loot the company after a judgment is entered. If the beneficiaries of the fund are to recover the contributions that are due on their behalf,[14] they must "pierce the corporate veil."

The doctrine of piercing the corporate veil has long been used by the IPF in ERISA cases to secure payment of employer delinquencies. It is a weapon that, while not frequently invoked (because of the difficulties of proof), is nonetheless an essential weapon in the IPF's arsenal to combat fraud by certain employers.

SUMMARY OF ARGUMENT

The question presented by this case is whether federal courts can continue to apply in ERISA cases the well-established doctrine of federal common law veil piercing to allow beneficiaries and funds to recover benefits due them under ERISA. This Court has consistently disregarded the corporate form and pierced the veil when required to prevent fraud or injustice or to avoid defeating legislative policies. The veil piercing doctrine is a broad "equitable principle," or a "qualification or denial" of the principle of limited liability. It is not, as the court below recognized, itself a "cause of action".

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[14] In the case of pension plans, ERISA requires the fund to provide the beneficiary with pension credits regardless of whether the contributions are recovered in the collection process. In the case of health and welfare plans, no such credit need be given and the employees lose medical coverage if the contribution is not made. Delinquencies therefore result in unanticipated costs to pension plans and the loss of medical benefits to those beneficiaries covered by health plans.

The federal common law of veil piercing has been uniformly recognized and applied by the courts of appeals in ERISA delinquency cases. The circuits have all adopted a parallel three-factor federal common law veil piercing test, which "demands a substantial showing" by a plaintiff that each factor is present. The Fourth Circuit properly applied this familiar test to respondent Thomas' evidence, which proved that Petitioner Peacock siphoned off the assets of Tru-Tech, a corporation he controlled, for his own personal benefit and to deny his employees the ERISA benefits Tru-Tech owed them. Given the difficulties of uncovering corporate machinations like Peacock's, and the substantial evidentiary burden a plaintiff must shoulder, affirmance of the judgment below will not open the litigation floodgates or expose corporate shareholders to unwarranted liability.

The decision below does not create a new "cause of action," ERISA remedy or category of persons subject to ERISA's liability, or otherwise run afoul of *Mertens v. Hewitt Associates,* —— U.S. ——, 113 S. Ct. 2063 (1993) and *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134 (1985). Once the court of appeals pierced Tru-Tech's corporate veil due to Peacock's abuse of the corporation, Peacock and Tru-Tech became "one for all purposes." *United States v. Lehigh Valley R.R.,* 220 U.S. 257, 272, 274 (1911). The court below properly found him liable under ERISA, not because he is an ERISA fiduciary in his own right, but because he *is* True-Tech, a conceded ERISA fiduciary.

Taft-Hartley plans faced such daunting problems collecting delinquent employer contributions that Congress amended ERISA in 1980 to give it even more "teeth." Against this background, reversal of the Fourth Circuit would take away a weapon ERISA plans had even before the 1980 amendments, and run counter to Congress' express intent to facilitate plan collections from delinquent employers, including those who loot their corporations.

Every court to have addressed the issue in an ERISA case has recognized the veil piercing doctrine, even those which, consistent with *Mertens,* have simultaneously rebuffed attempts to expand ERISA's definition of "employer" in order to reach corporate officers. Indeed, these decisions affirmatively, and correctly, find that to sanction corporate abuses like Peacock's in the ERISA context would thwart Congress' discernible intent.

Contrary to Petitioner's argument, state law cannot govern here. First, collection of employer delinquencies can only be brought in federal court. Second, because Peacock stands in the shoes of a fiduciary in breach, Thomas' second action clearly "relates to" an ERISA plan, and state law would be preempted by ERISA.

Under Peacock's theory, the veil piercing doctrine could be used in an ERISA case only if the corporate officer was brazen or witless enough to abuse the corporate form (and the beneficiaries or fund lucky enough to learn of the abuses) before an adverse judgment was entered against the corporation. If neither event occurred before judgment, the federal doctrine (and a federal forum) would be unavailable. But the availability of veil piercing in ERISA cases cannot turn on the fortuity of the timing of the "corporate strategies" employed by schemers like Peacock, if only because such a rule would reward those who are the cleverest and most sophisticated in the use of the veil to disguise their siphoning off of corporate assets.

Finally, reversal here would deprive Taft-Hartley and other ERISA funds of important procedural and tactical advantages Congress was careful to afford them, such as the right to sue employers in the district where the plan is administered, and to effect nationwide service of process. What Peacock advocates would not only strip away these statutory protections, but would also mean that every ERISA delinquency case involving veil piercing would be

brought in two states, in two forums and under two sets of laws—first in federal court (and under federal law) where the Plan is administered, and then, under state law, in whatever state the employer happened to be located. This patchwork of litigation, with its attendant expense and difficulty for the funds, is obviously desirable for corporate manipulators like Peacock (whose goal it is to cheat their employees out of ERISA benefits), but harmful to fund beneficiaries. Allowing Peacock to reach that goal in this fashion is contrary to the letter and the spirit of ERISA.

ARGUMENT

I. THE ORIGINS AND NECESSITY OF THE CORPORATE VEIL PIERCING DOCTRINE

Chief Justice Marshall observed nearly 200 years ago that a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law." *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 250, 303 (1819). The venerable doctrine of "piercing the corporate veil" is a necessary reality check on this legal fiction, and its attendant privilege of limited liability. As Professor Wormser (who apparently popularized the term "veil piercing") has written,

> [s]ince the element of personality is an extraordinary privilege conferred upon the corporation by the law, and involves the employment of a fiction, . . . "[the corporate form] must be used for legitimate business purposes and must not be perverted" . . . .

I. Maurice Wormser, *Disregard of the Corporate Fiction and Allied Corporation Problems* 8-9 (New York: Baker, Voorhis & Co. 1927) (citation omitted). Accordingly,

> the fiction will be disregarded and the law will look to see the men and facts behind the fiction whenever it is employed "to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery and crime."

Id. at 40.

These doctrines are likewise firmly embedded in the jurisprudence of this Court, which has

> long recognized "the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939). In particular, the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies.

First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 629-30 (1983). *See also Anderson v. Abbott*, 321 U.S. 349, 362 (1944); *Lehigh Valley*, 220 U.S. at 271-74.

Limited liability of corporations, then, is a privilege, just as the veil-piercing exception is a prophylactic limitation on that privilege. This exception has been variously termed an "equitable principle" (*First Nat'l City Bank*, 462 U.S. at 629), a "qualification or denial" of the principle of limited liability (*Anderson*, 321 U.S. at 362), an "exception" to the "rule" of limited liability (Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89 (1985)), a "doctrine" (*id.* at 109), or a "disregard" of the "fiction" of the corporate form (Wormser, *supra*, at 40). But an attempt to pierce the corporate veil

> *"is not itself a cause of action* but rather is a means of imposing liability on an underlying cause of action . . . ." 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 41, at 603 (perm. ed. rev. vol. 1990).

Thomas v. Peacock, 39 F.3d 493, 499 (4th Cir. 1994) (emphasis added).

II. THE TEST FOR VEIL PIERCING IN ERISA CASES IS WELL-DEFINED AND DIFFICULT TO MEET

The doctrine of piercing the corporate veil has been applied by many courts in ERISA delinquency cases. As articulated in *Alman v. Danin*, 801 F.2d 1, 4 (1st Cir. 1986), relied upon by the court below (*Thomas*, 39 F.3d at 504), a court will look to three factors in determining whether to pierce the corporate veil: (1) the respect paid by the individuals to the corporate identity; (2) the fraudulent intent of the principals; and (3) the degree of injustice that would be visited on the litigants by recognizing the corporate identity. *Accord United Elec. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1092-93 (1st Cir. 1992) (Breyer, Selya and Cyr, JJ.). The other courts of appeals have adopted a substantially similar federal common law veil piercing test in ERISA cases. *See, e.g.*, cases cited in *id.; see also Operating Eng'rs Pension Trust v. Reed*, 736 F.2d 513, 515 (9th Cir. 1984) (Kennedy, J.).

That three-factor test "demands a substantial showing" by a plaintiff that each factor is present. *United Elec.*, 960 F.2d at 1092-93. To meet that burden, a litigant must prove, for example, that corporate formalities and independence were ignored (*Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc.*, 736 F.2d 516, 524 (9th Cir. 1984)); that an owner looted the company for the owner's personal benefit (*Laborers' Pension Trust Fund v. Sidney Weinberger Homes, Inc.*, 872 F.2d 702, 705 (6th Cir. 1988)); that the firm had "wholly inadequate capitalization" (*Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1221 (2d Cir. 1987)); or that the owner abused the corporate form "in an inequitable fashion to avoid its obligations" (*Contractors, Laborers, Teamsters & Eng'rs Health & Welfare Plan v. Hroch*, 757 F.2d 184, 191 (8th Cir. 1985)). The Fourth Circuit here did no more than apply this familiar test to Thomas' proof which, as the court of appeals

found (in a holding Peacock did not appeal to this Court), established that Peacock

> engaged in a "corporate strategy" with "the specific intent and purpose . . . [of] siphon[ing] off [Tru-Tech's] assets to favored creditors owned or controlled by Peacock and to defeat collection of the *Thomas* judgment."

Thomas, 39 F.3d at 505.

Permitting funds such as the IPF to continue to pursue unscrupulous individuals like Peacock will not subject officers and shareholders of legitimate corporations to wholesale imposition of ERISA liability. The "piercing" doctrine will continue to come into play only when a plaintiff makes a "substantial showing" that there has been a total disregard of the corporate form, or that the corporation has been converted into a vehicle to defraud beneficiaries. In (and only in) those circumstances, the perpetrators will be denied the protection of the corporate veil, not because there is an independent "cause of action" against them under a "piercing" theory, but because the wrongdoer is no longer entitled to the protection of the legal fiction of the corporate shield, and will be deemed to *be* the corporation and, as such, liable under ERISA for the payment of contributions.

III. THE UNIVERSALLY RECOGNIZED FEDERAL VEIL PIERCING DOCTRINE FOLLOWED BY THE FOURTH CIRCUIT IS CONSISTENT WITH ERISA AND THIS COURT'S TEACHINGS

Petitioner cites no case (because to our knowledge there is none) in which a court has refused to apply the veil piercing doctrine to any other federal statute. Peacock nonetheless argues that Congress chose ERISA as its first vehicle to forbid federal courts from piercing the corporate veil, thereby allowing abuses of the corporate form designed to evade ERISA obligations, to be remedied (if at all) in the state courts.

Petitioner never comes to grips with the fact that every court facing the issue has recognized that veil piercing is available in an appropriate ERISA breach of fiduciary duty case, as in all others. *See, e.g., Massachusetts Laborers' Health & Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 26-27 (1st Cir. 1988) (Breyer, J.); *United Elec.*, 960 F.2d at 1091-93; *Connors v. P & M Coal Co.*, 801 F.2d 1373, 1377-78 (D.C. Cir. 1986) (Scalia, Ginsburg, D. & Buckley, JJ.); *International Bhd. of Painters v. George A. Kracher, Inc.*, 856 F.2d 1546, 1547, 1550 & n.28 (D.C. Cir. 1988); *Hroch*, 757 F.2d at 190-91; *Laborers Clean-Up Contract Admin. Trust*, 736 F.2d at 523-25; *Solomon v. Klein*, 770 F.2d 352, 353-54 (3d Cir. 1985); *Laborers' Pension Trust Fund*, 872 F.2d at 704-05; *Cement & Concrete Workers Dist. Council Welfare Fund v. Lollo*, 35 F.2d 29, 36-37 (2d Cir. 1994).[15]

What is particularly instructive about this uniform body of appellate court precedent is that in every case where the question was presented, the court of appeals (consistent with *Mertens*) rejected attempts to expand the ERISA definition of "employer," while simultaneously recognizing that its refusal did not abrogate the doctrine of corporate veil piercing in an ERISA context. Indeed,

[15] We note at this juncture that Peacock cites *Reich v. Compton*, 57 F.3d 270 (3d Cir. 1995), as holding directly that "*Mertens* forbids any sort of relief . . . against nonfiduciaries for engaging in conduct not prohibited by ERISA" (Pet. Br. 17 n.8), and as providing indirect support for his proposition that ERISA's definition of a "fiduciary" specifies when the corporate veil may be pierced in an ERISA case. (Pet. Br. 19 & n.12.) The short answer to this citation is that here Peacock (by virtue of his corporate manipulation) stands in the shoes of Tru-Tech, which *is* a fiduciary and engaged in conduct which *is* prohibited by ERISA. Moreover (as Peacock's "Cf." signal candidly admits), *Compton* is not a fiduciary veil-piercing case but rather a "prohibited transaction" case brought under the much more technical requirements of 29 U.S.C. § 1106. If it had been a fiduciary veil piercing case, the Third Circuit would have applied the same federal veil piercing test used by the Fourth Circuit here. *See Solomon*, 770 F.2d at 353-54.

the circuit courts were at pains to emphasize that their holdings left the doctrine undisturbed. *See Massachusetts Laborers'*, 845 F.2d at 25-26; *International Brotherhood*, 856 F.2d at 1547, 1549-50; *Solomon*, 770 F.2d at 353-54; *Connors*, 801 F.2d at 1377-78.

What the District of Columbia Circuit said about the "hallmark corporate law" doctrine of limited liability in the ERISA context applies to the equally deep-rooted corporate law principle of piercing the corporate veil in ERISA cases:

> Surely if Congress had decided to alter such a universal and time-honored concept, it would have signaled that resolve somehow in the legislative history. We may usefully recall what quite recently in *Connors v. P & M Coal Co.* we announced:
>
> "We find nothing in the language or purpose of [ERISA] to justify so significant a compromise of the corporate principle of limited liability. . . ."

International Brotherhood, 856 F.2d at 1550. Here, as in *International Brotherhood* and *Connors*, there is nothing in the "language or purpose" of ERISA which supports Petitioner's argument that the Act destroys the federal corporate veil doctrine. To the contrary, the text and intent of the statute affirmatively establish that Congress preserved the doctrine for use in federal court by ERISA beneficiaries and funds. *United Elec.*, 960 F.2d at 1091-93 (collecting cases). As the First Circuit there pointed out, "sanctioning conduct" abusive of the corporate form like that engaged in by Peacock here, would put the federal courts "at cross purposes with Congress and thwart Congress's discernible intent." *Id.* at 1092.

Petitioner (Pet. Br. 12, 14) argues that by applying the traditional doctrine of veil piercing, the Court of Appeals "expands" ERISA to include a federal "cause of action," contrary to this Court's admonition in *Mertens*, 113 S. Ct. at 2071. This proposition has twin, and independently

fatal, flaws. First, as we established in Part I, piercing the corporate veil is in no sense a "cause of action."[16] Rather, piercing the corporate veil simply stands the individual in the shoes of the corporation:

> When state law pierces the corporate veil, where the owner is the corporation's alter ego, where state or other relevant federal law makes the owner liable, it is fairly easy to say that the owner *is* the corporation, and that the owner is therefore an "employer" (under ERISA's definition) "who is obligated" (under state or other relevant federal law) "to make contributions to" a pension plan. Indeed, in such a case he is an employer *already obligated* . . . to make the contributions.

[16] To be sure, there are cases in which courts in dicta (or litigants) loosely use the phrase "cause of action" in reference to the veil piercing theory. *See, e.g., Lumpkin v. Envirodyne Indus., Inc.*, 933 F.2d 449, 460-63 (7th Cir.), *cert. denied*, 502 U.S. 939 (1991). This terminology does not alter the fact that, as the court below concluded, veil piercing is a substantive law "rule" that "determines *who* is liable for breaches of ERISA fiduciary duties." *Thomas*, 39 F.3d at 503. *See also id.* at 499, 500; *Lumpkin*, 933 F.2d at 460-61; *United Elec.*, 960 F.2d at 1092 and cases there cited. Finally, see Pet. Br. 15, 18, 26 (referring to veil piercing as a "standard" or "rule"). Nor does it mean that veil piercing is a new "cause of action" under *Mertens*, or a new "remedy" under *Russell*, 473 U.S. 134. In *Mertens* (in contrast to this case), because the defendant was concedely *not* a fiduciary, he could only have been found liable by expanding ERISA's definition to include a non-fiduciary, an expansion this Court found flew in the face of the text of ERISA. Similarly, in *Russell*, this Court rejected an attempt to add a new remedy to those Congress had deliberately chosen to incorporate in the statute.

By contrast, here, as we have shown, Congress explicitly made corporations that exercise fiduciary control part of the class of liable persons, and specifically included the remedy for fiduciary breaches Thomas seeks. 29 U.S.C. § 1109. Since it is undisputed in this Court that Peacock "is" his corporation Tru-Tech, it cannot be said that the judgment below "adds" anything to ERISA within the meaning of *Mertens* or *Russell*.

Massachusetts Laborers', 845 F.2d at 26 (emphasis in original). *See also Lehigh Valley*, 220 U.S. at 272, 274 (when corporate veil pierced, corporation and those behind veil become "one for all purposes" and are treated as "one and inseparable"); *Steinberg v. Buczynski*, 40 F.3d 890, 892 (7th Cir. 1994) (those who abuse corporate form deemed to "stand in the shoes of their corporation as debtors to the pension fund").

Second, Petitioner ignores the fundamental differences between this case and *Mertens*. Unlike *Mertens*, this case (and collection cases generally) do not involve the question of expanding the definition of "fiduciary" beyond the explicit categories enumerated in ERISA.[17] Rather, they raise the issue of who *in fact* is the corporate employer, a fictional entity ERISA on its face makes liable for the payment of contributions on behalf of its employees. *See Massachusetts Laborers'*, 845 F.2d at 24.[18] When, in an appropriate case, a court lifts the corporate veil and imposes liability on its controlling individuals or entities, it does not "expand" the class of liable persons. To the contrary, a court in that instance imposes liability on the

[17] Petitioner makes much of the fact that Thomas is attempting to pierce the corporate veil against Peacock when Peacock was found, in the first proceeding, not to be a fiduciary. In ERISA Taft-Hartley fund collection actions, the issue of whether the delinquent employer is a "fiduciary" never comes into play because an employer does not have discretion and control over fund assets (as required for fiduciary status under *Mertens*) and cannot gain such discretion and control because participating employers are "parties in interest" under ERISA. 29 U.S.C. §§ 1003(14), 1106. Consequently, the issue of fiduciary status is irrelevant under §§ 1132(g)(2) and 1145. Moreover, as we show *infra*, Petitioner's reliance on *Mertens* is misplaced even outside the Taft-Hartley collection context.

[18] The standards for piercing the corporate veil (respect for corporate identity, fraudulent intent, etc.) are different from those used to determine who is an ERISA fiduciary (discretionary control or authority over fund assets or management). *See, e.g., Thomas*, 39 F.3d at 503 n.14; 29 U.S.C. § 1002(21)(A); *Mertens*, 113 S. Ct. at 2066.

very persons who, *but for* the privilege of limited liability afforded by the legal fiction of the corporate form, would have been so liable *in the first place*.

Such a result is not only commanded by the text of ERISA, but also furthers the ERISA policies of keeping ERISA plans solvent and ensuring that unscrupulous corporate schemers like Peacock do not abuse the corporate form so as to deny ERISA beneficiaries the retirement benefits they have worked hard to earn. *See Ryan*, 767 F.2d at 1173. The response to Petitioner's contention that ERISA (alone in all the law) compels federal courts to allow the Peacocks of the corporate world to (in Professor Wormser's words) use the fiction of the corporate form to "defraud creditors" like ERISA beneficiaries, "evade existing obligations" to their employees, "circumvent a statute" such as ERISA, or to "protect knavery" akin to the corporate shenanigans Peacock concededly resorted to here, should be "not while this Court sits." *See Anderson*, 321 U.S. at 366-67; *Lehigh Valley*, 220 U.S. at 273-74.

IV. THIS COURT SHOULD DECLINE PETITIONER'S INVITATION TO DEPRIVE ERISA PLANS OF A CRITICAL WEAPON IN EMPLOYER DELINQUENCY CASES

The problem of employer delinquencies was so acute and posed such an economic threat to the well-being of Taft-Hartley funds that in 1980, the statute was amended to give it "teeth." *See Ryan*, 767 F.2d at 1173-74. National funds like the IPF must chase thousands of delinquent employers every year. The most difficult delinquency cases do not involve employers with ongoing operations, but employers who are "here today and gone tomorrow." More and more, this phenomenon of the vanishing or insolvent employer is attributable to fraud rather than any economic malaise. In those instances when an employer has disregarded the corporate form in order to perpetrate a fraud on creditors, including the

fund, the doctrine of piercing the corporate veil has proven to be the only effective weapon.[19]

This is not a case in which beneficiaries or Taft-Hartley funds are asking the Court for expanded powers under ERISA. The doctrine of piercing the corporate veil is so well-established and so widely accepted by the courts that it has been used for decades to combat corporate fraud in ERISA cases. Peacock now asks this Court to turn back the clock by taking that weapon away from the funds and relegating them to the vagaries of state litigation. Such action not only would be contrary to the policy of ERISA, but would be unfair to those that Congress expressly sought to protect.

V. STATE LAW CANNOT GOVERN ERISA CASES IN WHICH THE DOCTRINE OF PIERCING THE CORPORATE VEIL IS INVOKED

A. Employer Delinquency Cases Must Be Litigated In Federal Court

Petitioner argues that piercing the corporate veil is a matter traditionally committed to the states, which are

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[19] A recent IPF experience illustrates the point. On July 20, 1993, the IPF obtained a judgment against two companies, Shared Management Group, Ltd. and Division 4 Masonry Inc., both of which thereafter closed their doors. IPF subsequently obtained documents that revealed a "silent partner," Robert Sansone, who was the sole shareholder of the companies. In the IPF's asset discovery of the defunct companies, it was learned that neither company had followed the corporate formalities, such as holding annual meetings of the directors and shareholders. In addition, Sansone borrowed money from each corporation without appropriate loan documentation. While insolvent, the corporations repaid money to several of its "investors" who were associated with Sansone. A new action thereafter was filed by the IPF, this time naming Sansone as a defendant and seeking recovery under the doctrine of piercing the corporate veil. Following Sansone's deposition, the matter was resolved by Sansone's payment of the full contributions owed by the defunct corporations. *Joyce v. Shared Management*, Civ. No. 93-0974 (D.D.C. filed May 11, 1993); *Joyce v. Sansone*, Civ. No. 94-02137 (D.D.C. filed Oct. 4, 1994).

competent to adjudicate such issues. (Pet. Br. 25-28). But, at least as to the collection of employer delinquencies under 29 U.S.C. § 1132(g)(2) of ERISA, the states lack jurisdiction to do so. 29 U.S.C. § 1132(e)(1) provides in pertinent part:

> Except for actions under subsection (a)(1)(B) of the section [actions by beneficiaries], the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by . . . a fiduciary . . . .

If Petitioner is correct that state courts alone may employ the doctrine of piercing the corporate veil in ERISA cases, then individuals who defraud fund beneficiaries will be immune from prosecution under ERISA or state law, because federal jurisdiction is exclusive. When Congress has so clearly expressed its desire to protect those beneficiaries by putting "teeth" in the statute, it would be anomalous to provide fewer rights and protections for those beneficiaries than for everyone else.

B. Federal Jurisdiction Over ERISA Actions For Collection Of Employer Delinquencies Is Exclusive And State Law Is Preempted

Peacock asserts that state veil piercing laws are not preempted by ERISA because they do not "relate to" an employee benefit plan. (Pet. Br. 21-25.) To support this theory, Petitioner points out that the Tru-Tech plan is "long gone," such that the amended complaint cannot relate to ERISA. (Pet. Br. 22.)

Petitioner's contention that ERISA has disappeared from this case is simply wrong. Although it is true that Peacock's scheme to siphon off corporate assets for his own benefit was well disguised and necessitated a second legal action, this does not alter the fact that the second action remained an ERISA collection action brought to recover for damages to plan beneficiaries. Had Thomas been aware of Peacock's misdeeds at the time the first suit was

filed, he would have named Peacock as a defendant, *not* as a fiduciary, but as a person who *was* the corporation under the doctrine of piercing the corporate veil.[20] Given the success of Peacock's scheme, Thomas was entitled to name him as a defendant in the second action and seek relief, under the federal common law doctrine of piercing the corporate veil, for the ERISA contributions owed by his corporation.

Under Peacock's theory, the availability of the veil piercing doctrine in an ERISA case would turn on the timing of corporate machinations. Thus, Peacock asserted below that Thomas could and should have made his veil piercing contention when he filed his first complaint, even though Peacock had then yet to embark on his nefarious "corporate strategy" to avoid his company's ERISA obligations. *Thomas,* 39 F.3d at 503 n.14. In the same breath (using the Catch-22 approach that also drives his preemption argument), Peacock contends that because he manipulated and abused the corporate form *after* the initial judgment had been entered and Peacock found (on the then known facts) not to be a fiduciary, ERISA prevents Thomas from relying on a veil piercing doctrine to enforce the judgment against Peacock.

Two responses are in order. First, the availability of the doctrine cannot turn on the timing of the corporate scheme, if only because such a rule would reward those who lie in the weeds (or conceal their strategy) until after a judgment is entered. Second, that Peacock was found not to be a fiduciary in the first phase of the litigation is irrelevant for, as *Mertens* recognizes, persons otherwise not liable under ERISA, may "become liable for damages" whenever they "cross the line" drawn by ERISA between non-fiduciaries and fiduciaries by engag-

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[20] Indeed, Peacock claimed below that Thomas should have and (more importantly for present purposes) could have, named Peacock as a defendant under a veil piercing theory in his initial complaint. *See Thomas,* 39 F.3d at 503 n.14.

ing in conduct that brings them within the reach of the statute. 113 S. Ct. at 2071-72.[21] Here, of course, Peacock "crossed the line" when he abused Tru-Tech's corporate form and stepped into the corporation's shoes. Then (but only then) could it be said that Peacock "simply *is* the corporation." *Massachusetts Laborers'*, 845 F.2d at 24 (emphasis in original). *See also Thomas*, 39 F.3d at 502 n.11.

Finally, Thomas' second action against Peacock in any event had to be brought in federal court. That is so because it "relates to" an employee benefit plan, as it sought to recover damages awarded under ERISA for breach of fiduciary duty by Peacock's corporation. 29 U.S.C. § 1109. In these circumstances, where the beneficiaries sought to pierce the veil and impose that liability on Peacock, state corporate law is preempted and federal common law must govern.[22]

C. Relegating These Actions To State Court Would Deny The IPF And Other Funds Important Procedural Safeguards

Peacock contends that a rule requiring veil piercing actions to be brought in state court would in no way

[21] *Compare Farm King Supply, Inc. Integrated Profit Sharing Plan & Trust v. Edward D. Jones & Co.*, 884 F.2d 288 (7th Cir. 1989) (broker who followed investment adviser's instructions in executing transactions is not a fiduciary) *with Olson v. E.F. Hutton & Co.*, 957 F.2d 622, 626 (8th Cir. 1992) (broker whose advice served as a primary basis for investment decisions was a fiduciary).

[22] The statement in *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 833 (1988), that "ERISA does not provide an enforcement mechanism for collecting judgments won" does not change this result. As the Fourth Circuit held (*Thomas*, 39 F.3d at 502), *Mackey* would only be relevant if this were an action to execute on the judgment Thomas won below (by way of garnishment of Peacock's wages, for example, as was the case in *Mackey*). But that enforcement action is yet to come, and will only take place if this Court affirms the judgment. Until this Court does so, there is no final judgment against Peacock to "collect" or "enforce." *See Thomas*, 39 F.3d at 503.

thwart uniformity or undermine any other ERISA policy. (Pet. Br. 25-28.) However, every court presented with the question has reached the contrary result, concluding that ERISA mandates a federal common law of veil piercing. *See* cases cited in Part III, *supra*.

Additionally, it is important to recognize that the rule Peacock advocates would operate to the severe detriment of plans such as the IPF. Since 29 U.S.C. § 1132(e)(2) allows ERISA actions to be brought where the plan is "administered," the IPF can bring suit against any of its thousands of participating employers in Washington, D.C., and can effect nationwide service of process to obtain jurisdiction over them there. The provision confers at least two substantial benefits on the IPF. First, there is the saving realized by suing in one jurisdiction through one counsel, as opposed to retaining counsel throughout the United States. Indeed, delinquencies can be handled on an "assembly line" basis, reducing costs to the plan. Second, § 1132(a)(2) affords a significant tactical advantage to plans like the IPF. A California employer sued in Washington, D.C. is much more likely to settle the matter than if the litigation were brought in its home district. This ERISA provision therefore produces both savings and tactical benefits.

If Peacock's proposal were adopted, every ERISA delinquency case in which it is necessary to "pierce the corporate veil" would be litigated at least in two stages in two forums, and under both state and federal law. In the first phase, suit would be brought and decided under federal law in the federal court where the plan is administered, just as are the many other delinquency suits instituted by the fund. In the second phase, suit would have to be brought (says Peacock) in the state court located in the employer's home district, under state law rather than federal common law, to obtain a judgment from the person hiding behind the corporate veil. We submit that there is no basis for allowing delinquent em-

ployers, who have cheated their employees out of contribution payments, to enjoy procedural benefits and require funds to engage in costly nationwide litigation, particularly at the expense of advantages now enjoyed by ERISA plans.

CONCLUSION

The court of appeals should be affirmed.

Respectfully submitted,

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October Term, 1995

D. Grant Peacock,
Petitioner,
v.
Jack L. Thomas,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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STATUTES

Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* ..... *passim*

MISCELLANEOUS

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

No. 94-1453

D. GRANT PEACOCK, *Petitioner*,
v.
JACK L. THOMAS, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 79 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties, as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

A. The threshold issue for decision is whether the district court had jurisdiction to determine whether the judgment against Tru-Tech, Inc. was enforceable against a person not named in that judgment but alleged to be the alter ego of the judgment debtor. The generic question of jurisdiction to enforce a federal judgment against

a closely-related third party may arise in any of the following contexts: Where a judgment debtor secrets its assets in the possession of such a third party; where a judgment debtor fraudulently conveys ownership of its assets to the third party in order to defeat a federal judgment; and where, as here, following the entry of a federal judgment, a third-party owner disregards the corporate form of the judgment debtor and depletes the debtor's assets to frustrate satisfaction of the federal judgment. In each of these situations, we submit, a federal court that enters a judgment and that has jurisdiction over the person of the third party also has ancillary jurisdiction to enforce the federal judgment.

The governing principle is that "[t]he jurisdiction of a court is not exhausted by the rendition of its judgment but continues until that judgment shall be satisfied." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 23 (1825). This principle has given rise to the doctrine of "ancillary jurisdiction" which enables a federal court to "vindicate its authority, and effectuate its decrees." *Kokkonen v. Guardian Life Ins. Co. of America*, —— U.S. ——, 114 S. Ct. 1673, 1676 (1994). And, this Court has established that, "in aid of a jurisdiction previously acquired," a federal court has ancillary jurisdiction "over persons not parties to the judgment sought to be enforced." *Labette County Commissioners v. United States ex rel. Moulton*, 112 U.S. 217, 219 (1884). Moreover, where as here, a federal judgment debtor conspires with a third party to frustrate the judgment, a federal court must have the power to act in order to "vindicate its authority and effectuate its decrees." *Kokkonen*, 114 S. Ct. at 1676.

This Court's decision in *H.C. Cook v. Beecher*, 217 U.S. 497 (1910), is not to the contrary. That case involved allegations that, prior to the entry of judgment, corporate directors had managed the corporation in a way that failed to take into account the pendency of the lawsuit; it most emphatically did not involve conduct that took place after the federal judgment was entered and that was intended to avoid that judgment.

B. The only additional question is whether the courts below correctly held that the judgment against Tru-Tech could be enforced against Peacock. The court of appeals held that "ERISA preempts any state law of veil piercing" and provides the rule of decision in proceedings to enforce an ERISA judgment against corporate officers or directors based on post-judgment conduct. But the appellate court immediately acknowledged that "the federal common law veil-piercing rule accords with our understanding of the South Carolina rule," Pet. App. 22a-23a n.16. This being so, there is no reason for this Court to resolve the choice of law question that petitioner raises.

ARGUMENT

A. The decisions below—and the briefs of petitioner and his *amici* in this Court—address a range of issues under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., including issues critical to deciding this case, others not necessary to the decision of the case and still others not even raised by the case. We therefore begin by defining what this case is—and, equally important, is not—about.

At the threshold, this case does *not* raise any question of substance as to the scope of the ERISA liability of "fiduciaries," as defined by the Act. Where an ERISA fiduciary takes the corporate form (and especially the form of a closely held corporation), questions can arise as to the liability of an individual who controls the fiduciary corporation for the corporation's actions. But the district court, in the original proceeding here, ruled that only Tru-Tech, Inc., and not petitioner Grant Peacock, was liable for violating ERISA. That judgment was affirmed on the first appeal, and that ruling forms the law of this case.

The instant proceeding thus has a single cause and a single focus: Grant Peacock's conduct *after* Tru-Tech had violated ERISA and *after* the entry of the ERISA

judgment against Tru-Tech. The district court found that from the time of judgment in November, 1988, until the dissolution of Tru-Tech in May, 1990, Peacock, as the sole director of Tru-Tech, "directed the management of Tru-Tech's affairs to defeat the collection of the judgment by siphoning off the assets of the corporation to certain favored creditors owned or controlled by Peacock." Pet. App. 41a. The district court further found that "it was the specific intent of Peacock to defraud the former employees of Tru-Tech who were beneficiaries of the Pension Plan and to defeat their legitimate attempt to collect a lawful judgment." *Id.* 42a. Based on these and other findings, the district court ruled that the judgment could be enforced against Peacock. *Id.*

The questions posed here therefore concern the scope of a federal court's authority to enforce its judgments against persons not named in the judgment but who are closely connected to the judgment debtor. Specifically, the questions posed are (i) whether the district court had jurisdiction to determine whether its judgment in the original litigation was enforceable against Peacock; and (ii) if so, whether that court correctly decided that the judgment was so enforceable. It is to those questions that we now turn.

B. In answering the threshold jurisdictional question, it aids analysis, we believe, to consider three generic situations in which a federal court in enforcing its judgment may be called on to exercise jurisdiction over claims regarding persons who were not named in that judgment but who nonetheless are linked to the judgment debtor.

The first class of cases is the one in which a judgment debtor is alleged to have secreted the debtor's assets by transferring possession, but not ownership, of these assets to a spouse, a child or a business entity controlled by the judgment debtor or his family. In these cases, the federal court may be called upon to bring the spouse, child, or controlled business entity before it in order

to adjudicate whether the third party is in possession of the debtor's assets, and, if so, to compel the third party to transfer the debtor's assets to the judgment creditor in order to satisfy the court's judgment.

Second, there are cases in which a judgment debtor is alleged not merely to have transferred possession of assets of the debtor but to have fraudulently conveyed ownership to a related third party (again, such as a family member or a commonly controlled corporation) in order to defeat the judgment of a federal court. In these cases, the federal court may be called upon to bring the third party before it in order to adjudicate the lawfulness of the conveyance and, if fraudulent, to compel the third party to transfer the assets to the judgment creditor to satisfy the court's judgment.

Third, and finally, are cases like the instant one in which subsequent to the entry of a federal court judgment, the controlling owner or officer of a corporate judgment debtor is alleged to have disregarded the debtor's corporate form and to have depleted the debtor's assets to frustrate the execution of the court's judgment. In these cases, the federal court may be called upon to bring the third party before it to determine whether the third party has become the alter ego of the judgment debtor such that the court's judgment can be enforced against the third party (and all of that party's assets, whether or not previously owned by the judgment debtor).[1]

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[1] It is hornbook law that "when the corporation is the mere alter ego, or business conduit of a person, it may be disregarded. . . . . The rationale behind the alter ego theory is that if the shareholders themselves, or the corporations themselves, disregard the legal separation, distinct properties, or proper formalities of the different corporate enterprises, then the law will likewise disregard them so far as is necessary to protect individual and corporate creditors". 1 W.M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations*, § 41 (1990). *See also First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983) ("where a corporate entity is so extensively controlled by its owner that a relationship of principal and

In each of these situations, the federal court must, of course, first acquire jurisdiction over the person before the third party can be brought before the court.[2] But where that is accomplished through proper service of process, the question then arises as to whether the federal court has subject matter jurisdiction over the proceeding so as to enable the court to adjudicate the secretion, fraudulent conveyance, or alter ego issues.

C. The principles that govern the answer to that question were stated by Chief Justice Marshall 170 years ago in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 23 (1825):

> The jurisdiction of a court is not exhausted by the rendition of its judgment but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment in which jurisdiction is to be exercised. . . . Were it even true that jurisdiction could technically be said to terminate with the judgment, an execution would be a writ necessary for the perfection of that which was previously done, and would, consequently, be necessary to the beneficial exercise of jurisdiction.

The Court reaffirmed the teaching of *Wayman* in *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 187 (1867)—on which the court below principally relied—adding that:

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agent is created, . . . one may be held liable for the actions of the other") (citing *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-04 (1960)). *Accord G.M. Leasing Corp. v. United States*, 429 U.S. 338, 345 (1977); *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942).

[2] Grant Peacock denies that the federal district court in South Carolina properly acquired jurisdiction over him. But that issue was not addressed by the court of appeals and is not fairly encompassed in the questions presented by Peacock's petition for certiorari. In any event, it is well established that a court with personal jurisdiction over a corporation may also exert personal jurisdiction over its alter egos when the latter seek to avoid a federal judgment and to benefit themselves. *See* 4 Wright, Miller & Kane, *Federal Practice and Procedure* § 1069 (Supp. 1984).

> [T]he rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree. . . . Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purpose for which it was conferred by the Constitution.[3]

These principles have given rise to what we now refer to as the federal courts' "ancillary jurisdiction." Under this rubric, as this Court stated just last Term, the Court has "recognize[d] federal courts' jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them." *Kokkonen v. Guardian Life Ins. Co. of America*, —— U.S. ——, 114 S. Ct. 1673, 1676 (1994).[4] And, one of the primary offices of ancillary jurisdiction, as *Kokkonen* states, is "to enable a court to function successfully, that is, to manage its proceedings, *vindicate its authority, and effectuate its decrees.*" *Id.* at 1676 (emphasis added).[5]

A federal court's ancillary jurisdiction to effectuate its decrees extends not only to claims against parties to the

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[3] *See also, e.g., Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 53 (1825) ("The authority to carry into complete effect the judgments of the Court, necessarily results, by implication, from the power to ordain and establish such Courts. The suit does not terminate with the judgment, and all proceedings on the execution are proceedings in the suit").

[4] *See also* 6 Wright, Miller & Cooper, *Federal Practice and Procedure* § 1444 (2d ed. 1990) ("Ancillary jurisdiction is "based on the premise that a district court acquires jurisdiction over a case or controversy in its entirety and, as incident to the disposition of a dispute that is properly before it, may exercise jurisdiction to decide other matters raised by the case over which it would not have jurisdiction were they independently presented").

[5] In *Kokkonen*, the prior proceeding had been settled and as a result of the settlement the district court had entered a judgment of dismissal. This Court observed that:

> [I]f the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of

judgment but to third parties as well. That is the clear teaching of *Labette County Commissioners v. United States ex rel. Moulton*, 112 U.S. 217 (1884).

In *Labette County*, a plaintiff who had obtained a federal court judgment against a Kansas township sought to invoke the court's ancillary jurisdiction to obtain a writ of mandamus requiring the county in which the township was located to levy taxes to satisfy the judgment, as required by Kansas law. The County Commissioners sought to avoid the enforcement of the federal judgment as against them, stating that "because they are not parties to the judgment against Oswego Township, and are not officers of or representatives of that municipal corporation, but are officers of the County of Layette, the proceeding against them is the exercise of an original jurisdiction, which does not belong to that court." 112 U.S. at 219.

This Court *rejected* that argument. The Court explained that while it "is quite true . . . that there is no original jurisdiction in the circuit courts in mandamus," it is nonetheless appropriate for the federal court to issue a writ "in aid of a jurisdiction previously acquired" and "as the only means of executing their judgments." 112 U.S. at 220. And the Court specifically ruled that even though "the jurisdiction in mandamus is ancillary," that jurisdiction can "be exercised over persons not parties to the judgment sought to be enforced." *Id.*[6]

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dismissal—either by separate provisions (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order, ... a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist. [*Kokkonen*, 114 S. Ct. at 1677.]

[6] *Cf. Root v. Woolworth*, 150 U.S. 401, 411 (1893) (a federal court has ancillary jurisdiction to enforce a judgment on behalf of a party in privity with a party to the judgment); *Dugas v. American Surety*, 300 U.S. 414, 428 (1937) (same).

Indeed, the rule could hardly be otherwise. A judgment issued by a federal court is not idle words on a piece of paper, but rather the manifestation of an official governmental act intended to have the force and effect of law. A judgment would be far less than that if the federal courts lack the authority to address and resolve issues that arise when the party in whose favor the judgment runs is unable to obtain the benefits of the judgment and claims that the party against whom the judgment runs has conspired with third parties to engage in conduct designed to evade the operation of the judgment. "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution fittingly calls 'the judicial power of the United States' would be a mere mockery." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).

The instant case thus involves nothing more than a run-of-the-mine application of a federal court's ancillary jurisdiction to "effectuate its decrees." Indeed, the instant case follows *a fortiori* from *Labette County*. There, ancillary jurisdiction was exercised over a claim against third parties—the county commissioners—even though no suggestion was made that the commissioners had done anything to frustrate the effectuation of the federal court's judgment. Here, in contrast, that is precisely what occurred. As noted above, respondents here alleged—and the district court found—that Grant Peacock, as Tru-Tech's sole director, acted to defeat the district court's judgment by "siphoning off the assets of the corporation" and transferring those assets to a corporation wholly-owned by Peacock and to a trust Peacock established for his wife.

Thus, ancillary jurisdiction is appropriate here not merely "in aid of a jurisdiction previously acquired," *Labette County*, *supra*, but, moreover, to "vindicate [the federal court's] authority and effectuate its decrees," *Kokkonen*, *supra*. If the power to "vindicate its author-

ity" is to mean anything, it must encompass cases such as this.

Labette County also disposes of Peacock's contention that due process concerns are implicated when a federal court extends its ancillary enforcement jurisdiction to a third party not named in the judgment. The county commissioners in *Labette County* were strangers to the judgment there, yet this Court had no difficulty in holding the claim against the commissioners to be within the federal court's ancillary jurisdiction. In *Labette County* it was enough for the Court that the county commissioners were "the parties on whom the law has cast the duty of providing for [the judgment's] satisfaction." 112 U.S. at 220.

Here, the claim is that Peacock has such a legal duty because he acted in such a way as to make himself the alter ego of—and thus, legally inseparable from—the party already before the court. If the exercise of ancillary jurisdiction in *Labette County* is consistent with due process, it again follows *a fortiori* that the exercise of such jurisdiction is proper here.

D. Grant Peacock's case thus reduces to the claim that the decision below is contrary to *H.C. Cook Co. v. Beecher*, 217 U.S. 497 (1910), the precedent the court below went to great pains to distinguish. Petitioner grossly overreads *Beecher*.

1. In *Beecher*, a Connecticut corporation brought a patent infringement suit in federal court against a second Connecticut corporation, alleging that the defendant was selling a product which infringed plaintiff's patent. The plaintiff corporation, after prevailing, sought to collect its judgment and found that the judgment exceeded the assets of the defendant corporation. The plaintiff corporation then filed a second suit in federal court against the *directors* of the defendant corporation, alleging that the directors voted to continue sales during the first lawsuit, and voted to expend funds to defend the lawsuit, knowing

that insolvency "would be the result of a judgment against [their corporaion in the first suit], . . . for the purpose of increasing the value of their stock in the company, and of receiving the profits and dividends that might be received from the sale." 217 U.S. at 498.

In an opinion whose analysis is contained in just one paragraph, this Court construed the suit against the directors as "an attempt to make the[m] answerable for the judgment already obtained." 217 U.S. at 498. The Court then stated without further explication that the case did not fall within the federal court's ancillary jurisdiction, concluding: "If the directors are under obligations by Connecticut to pay a judgment against their corporation, that is not a matter than can be litigated between citizens of the same State in the Circuit Court of the United States." *Id.*

Whatever the reasoning underlying the Court's conclusion in *Beecher*—and the Court's opinion provides no further insight into that reasoning—at least this much is clear: *Beecher* did not involve, and cannot be stretched to govern, the federal court's ancillary jurisdiction to "effectuate its decrees." *Kokkonen*, 114 S.Ct. at 1676.

There was no claim in *Beecher* that the directors had done anything *subsequent* to the entry of judgment to frustrate the enforcement of that judgment. Rather, the sole claim in *Beecher* was that because the directors of the corporation, *prior to the entry of judgment*, had managed the corporation in a way that did not take into account the pendency of the lawsuit (but that was not otherwise fraudulent or unlawful) the directors had opened themselves up to personal liability.

The question of whether there is federal court ancillary jurisdiction over such pre-judgment conduct is a question of substance. But it is not a question going to the existence of ancillary jurisdiction to effectuate decrees. That head of jurisdiction is concerned with conduct that takes place *after* a federal judgment is entered and that amounts to an effort to avoid that judgment.

Beecher's ruling that the claim against pre-judgment conduct there was not cognizable in federal court thus has nothing to say about the exercise of ancillary jurisdiction in cases like the instant one, where post-judgment conduct undermines the federal court's authority and its judgment.

2. In drawing the distinction just noted, we do not mean to suggest that there is no federal court ancillary jurisdiction to adjudicate claims that, by virtue of pre-judgment conduct, a third party should be held liable for the acts of a defendant wrongdoer. Indeed, this Court upheld the exercise of ancillary jurisdiction in just such a situation in *Dewey v. West Fairmont Gas Coal Co.*, 123 U.S. 329 (1887). *Dewey* was a diversity case in which the counterclaim plaintiff was permitted to implead a third party—with respect to whom there was no diversity of citizenship—where the counterclaim defendant was alleged to have become insolvent by fraudulently conveying assets to the third party. And, *Dewey*'s exercise of ancillary jurisdiction was cited with approval in *Finley v. United States*, 490 U.S. 545, 551-52 n.4 (1989).

It is not at all clear whether, and if so how, *Dewey* and *Beecher* can be harmonized so as to provide a coherent basis for defining the scope of ancillary jurisdiction to adjudicate claims that a third party's *pre-judgment* conduct makes that party liable for the defendant's wrongs. It may well be that *Beecher* reaches the right result but not on jurisdictional grounds.[7] The claims against the directors in *Beecher* rested on the extraordinary theory that during a lawsuit against a corporation the directors must act as trustees for the plaintiff or open themselves up to personal liability. We know of no legal support for that substantive theory and no basis why the claim should not have been dismissed on the merits.

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[7] *Cf. Argento v. Village of Melrose Park*, 838 F.2d 1483, 1488 (7th Cir. 1988) (questioning continuing vitality of *Beecher*); *Skevofilax v. Quigley*, 810 F.2d 378, 385 n.5 (3rd Cir. 1987) (en banc), *cert. denied*, 481 U.S. 1029 (reinterpreting *Beecher* as a statutory, rather than a jurisdictional, decision).

It is not necessary to decide that question here, however, because, as just explained—and as the court of appeals concluded, *see* Pet. App. 15a—the conflict between *Beecher* and *Dewey* and the question raised by those cases simply is not implicated here. For present purposes, it is enough to conclude that whatever the rule in the *Beecher* context, the federal courts ancillary jurisdiction plainly extends to claims that, subsequent to the entry of a judgment, the judgment debtor and a closely-related third party have colluded to frustrate the effectuation of that judgment.

E. The only remaining question is whether, on the merits, the courts below properly held that the judgment against Tru-Tech could be enforced against Grant Peacock. That question turns on the application of hornbook veil piercing principles to the facts of this case. As such, the question ordinarily would not merit the attention of this Court. Peacock therefore seeks to engage the Court's attention by focusing on a choice of law question addressed below.

The court of appeals did reason that because ERISA governs the determination of "*who* is liable for breaches of ERISA fiduciary duties, we believe that ERISA preempts any state law of veil piercing" and states the rule for determining when to pierce the corporate veil to enforce an ERISA judgment against officers or directors based upon their conduct subsequent to the entry of the judgment. Pet. App. 20a-21a (emphasis in original).

But immediately after deciding to apply a "federal common law veil-piercing rule," Pet. App. 21a—rather than to incorporate a state law rule into federal law, *see United States v. Kimball Foods, Inc.*, 440 U.S. 715, 726 (1979)—the court of appeals went on to conclude that the "federal common law veil-piercing rule accords with our understanding of the South Carolina rule," Pet. App. 22a, n.16, *viz.* with the state-law rule that would be incorporated into federal law if the federal common law derived from ERISA were not controlling.

Since, under the decision below, the choice between federal law and state law is *immaterial* to the outcome here, this case provides a particularly *inappropriate* vehicle for the Court to resolve the choice of law question Peacock raises.[8]

That being so, we respectfully submit that the Court either should dismiss the writ of certiorari with respect to the second question raised here or, alternatively, should uphold the determination below on the ground that regardless of whether federal common law or state law incorporated into federal law applies, it is proper to enforce the judgment against Peacock.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[8] The Court also need not decide whether, as the court below assumed, the veil-piercing rule used to determine when a judgment may be enforced against a corporate owner is necessarily the same as the rule for determining when the owner can be held liable for the corporation's wrong in the first instance since the only issue raised here concerns veil-piercing to enforce a judgment. *See* pp. 3-4, *supra*.

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No. 94-1453

In The Supreme Court of the United States

October Term, 1995

D. Grant Peacock,
Petitioner,
v.
Jack L. Thomas,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1453

D. GRANT PEACOCK,
Petitioner,

v.

JACK L. THOMAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

PRELIMINARY STATEMENT

The National Coordinating Committee for Multiemployer Plans ("NCCMP") submits this brief *amicus curiae* to urge the Court to affirm the holding below. Letters manifesting the consent of Petitioner and Respondent have been filed with the Clerk of the Court.

By enacting the Employee Retirement Income Security Act ("ERISA") in 1974 and its subsequent amendments

in 1980, Congress sought to enhance the financial stability of multiemployer employee benefit plans and to foster the growth and maintenance of such plans. 29 U.S.C. §§ 1001-1461. As reflected in ERISA's legislative history and more than two decades of case law construing the statute, Congress intended to implement the policies and objectives underlying the law by making all aspects of employee benefit plan regulation an exclusive federal concern. To this end, the statute itself contains a civil enforcement provision which—with one limited exception—gives federal district courts exclusive jurisdiction over all actions brought by plan fiduciaries (*e.g.*, the trustees of multiemployer plans), participants, beneficiaries, and the Secretary of Labor to enforce the statute or the terms of a plan, and over all actions by participants, beneficiaries, or the Secretary against plans or their fiduciaries for similar relief. 29 U.S.C. § 1132.[1] In addition, ERISA contains an expansive preemption provision providing for the supersedure of all state laws (including state common law) that "relate to" employee benefit plans except where expressly exempted.[2] Moreover, where ERISA is silent as to a particular matter affecting employee benefit plans, courts are required to develop a body of federal common

[1] The sole exception is to be found in ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), which gives state courts concurrent jurisdiction over actions brought by participants or beneficiaries under § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to enforce or clarify their rights to benefits under a plan. In such actions, however, state courts are required to apply federal law. Because the federal courts have far greater experience with ERISA matters, and because federal law is controlling, most plans or their trustees routinely remove such state actions to federal court, as can be judicially noticed.

[2] For example, state insurance, banking, and securities laws are expressly exempted from preemption except as applied to self-insured plans. 29 U.S.C. § 1144(b)(2)(A) and (B); likewise, state criminal laws of general applicability are expressly exempted under 29 U.S.C. § 1144(b)(4), while qualified domestic relations orders, as permitted by ERISA § 206(d)(3)(B)(i), are exempt under 29 U.S.C. § 1144(b)(7).

law to fill the statute's interstices. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).[3]

In the case at bar, the district court, mindful of the exclusively federal interests at stake, first assumed jurisdiction over the plaintiff-participant's action to enforce a prior ERISA judgment, and then applied a federal common law veil-piercing standard to impose liability for the judgment debt on an individual whose postjudgment conduct resulted in the original judgment debtor's financial inability to satisfy the judgment. The Fourth Circuit affirmed. Petitioner, however, attempts to turn the federal scheme on its head by arguing first that the federal court lacked subject matter jurisdiction over the participant's enforcement action and second, that even if jurisdiction did exist, state law rather than a more liberal federal veil-piercing standard should be applied.

The NCCMP files this brief because it strongly believes that a federal veil-piercing standard should be applied whenever a federal court finds it necessary to disregard the corporate form to enforce ERISA or an ERISA judgment. In addition, the NCCMP believes that, consistent with ERISA's goals and this Court's precedents, the trustees of multiemployer plans should be able to vindicate their rights in federal courts, including—where appropriate—against individuals whose postjudgment conduct is responsible for making an ERISA judgment uncollectible, to the detriment of a plan or its participants and beneficiaries.

[3] For example, following this Court's ruling in *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), in which the Court ruled that state antisubrogation laws are preempted by ERISA, federal courts have been developing federal common law to further define the scope of a plan's subrogation rights. *See Cutting v. Jerome Foods*, 993 F.2d 1293 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 308 (1993) (state "make whole" doctrine not adopted as federal common law and does not bar plan's right to full reimbursement of benefits paid).

INTEREST OF THE NCCMP

The NCCMP is a nonprofit, tax-exempt organization that was formed after the enactment of ERISA to participate in the further development of employee benefits legislation, government regulations promulgated to implement ERISA, and other laws affecting multiemployer plans. Currently more than 240 multiemployer plans and related international unions, located in at least 37 states, are affiliated with the NCCMP. These plans are representative of all the nation's multiemployer plans, which cover more than nine million workers. Thus, considering the NCCMP's broad range of constituent organizations and its contacts with hundreds of trustees who are charged with administering multiemployer plans in accordance with ERISA's fiduciary principles, the NCCMP believes that it is qualified to advise this Court of the practical implications the circuit court's decision will have on self-funded multiemployer plans, and to represent herein the position of the trustees, participants, and beneficiaries of such plans.[4]

The NCCMP believes that the Fourth Circuit correctly affirmed the district court's assumption of jurisdiction over an ERISA plan participant's action to enforce a prior ERISA judgment, and it endorses the circuit court's application of a federal common law veil-piercing standard to impose liability on an individual whose postjudgment conduct defeated the judgment. Therefore, the NCCMP submits this brief in support of the Respondent's request that this Court affirm the court of appeal's decision. To that end, this brief will delineate the far-reaching and beneficial consequences the Fourth Circuit's decision will

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[4] The NCCMP has participated as an *amicus curiae* in numerous cases involving important issues affecting multiemployer plans. *See, e.g., Local 144 Nursing Home Pension Fund et al. v. Demisay*, 113 S. Ct. 2252 (1993); *Concrete Pipe and Products of California v. Construction Laborers Pension Fund for Southern California*, 113 S. Ct. 2264 (1993); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990).

have on multiemployer plans in situations other than, and in addition to, the specific fact pattern at bar—particularly with respect to those plans' collection efforts.

The nature of multiemployer plans and the economic realities in which they operate make a federal veil-piercing standard critically important. As noted above, multiemployer employee benefit plans affiliated with the NCCMP are located throughout the nation. Many of those affiliates are large plans whose participants and contributing employers reside in numerous states. Consequently, actions to collect contributions and to enforce ERISA judgments against delinquent employers may be subject to varying degrees of restrictive state veil-piercing standards and laws pertaining to enforcement of judgments, thereby defeating Congress's goal of ensuring uniformity in the treatment of employee benefit plans.

Multiemployer plan trustees have a fiduciary obligation to maintain a sound funding policy and to collect unpaid contributions owed by contributing employers. For many reasons, however, plan trustees face great obstacles when attempting to fulfill those obligations. One such obstacle is the fact that many contributing employers who fail to make required contributions escape their liability by hiding behind the facade of corporate entities that are often nothing more than empty shells. Indeed, in many industries represented by multiemployer plans, such as the building and construction trades and service industries (such as restaurants), contributing employers are frequently family-owned close corporations which operate with substantial indifference to corporate formalities and to the appropriate capitalization of those corporations. Despite that fact, however, multiemployer plans, as third-party beneficiaries to collective bargaining agreements between unions and employers, must accept contributions from these employers and, concomitantly, must provide benefits to the employers' eligible participants, without having had a prior opportunity to investigate the creditworthiness of those employers or the manner in which

they operate their corporate businesses (information which is normally impossible to obtain absent discovery in the context of litigation). Thus, multiemployer plans, unlike ordinary trade creditors who can assess the risks associated with their contractual undertakings, suffer a great disadvantage to their self-preservation. Because of that serious disadvantage, multiemployer plans require and deserve the benefit of a more relaxed veil-piercing standard.[5]

Moreover, although ERISA contemplates that collection actions brought under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), and ERISA Section 515, 29 U.S.C. § 1145 for violation of the terms of a plan or of a collective bargaining agreement will normally be brought against contributing employers as business entities, the statutory definition of "employer" is sufficiently broad to permit liability for delinquent contributions to be imposed on the company's owners or directors in appropriate circumstances[6]—not because of their titles or positions, but because of specific conduct. In this context, a majority of federal courts have adopted a liberal federal veil-piercing standard as federal common law that is consistent with the fact that ERISA enforcement actions are federal cases; that ERISA places less importance on corporate separateness than on the policies sought to be

[5] The status of multiemployer plans as third-party beneficiaries of collective bargaining agreements executed by others is established pursuant to Section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186(c)(5). Multiemployer plans are unique creatures of federal statute, and their structure is strictly mandated by federal law. Thus, the disadvantages inherent in collecting judgments are not assumed by choice.

[6] ERISA § 3(5), 29 U.S.C. § 1002(5), defines the term "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." ERISA § 3(9), 29 U.S.C. § 1002(9), defines "person" as an "individual" as well as a "partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated association, or employee organization."

implemented by the statute; and that individual state veil-piercing standards, which are typically very restrictive, should not be utilized to frustrate federal legislative policy. The NCCMP supports this view and is concerned that it not be eroded. Finally, the NCCMP submits that it would be incongruous and inconsistent with ERISA's enforcement scheme to relegate such postjudgment enforcement actions to state courts, only to require those courts to apply federal common law to enforce a federal court judgment.

Thus, the NCCMP's brief focuses on issues which it believes may not be adequately presented elsewhere, including:

> (a) the need for a federal veil-piercing standard as part of ERISA's overall enforcement scheme, and, in particular, in connection with the collection efforts of multiemployer plans; and,
>
> (b) the propriety of federal courts' assuming jurisdiction over postjudgment enforcement actions where a federal common law standard of liability provides the only correct rule of decision.

SUMMARY OF ARGUMENTS

1. Federal common law

Where justice, fairness, and equity dictate, both federal and state courts are prepared to disregard the corporate form and to impose liability on a company's shareholders. As state veil-piercing standards are typically very restrictive, however, federal courts have traditionally applied a more liberal standard in order to effectuate federal interests and to enforce federal judgments. Consistent with this tradition, and with this Court's precedents, the majority of federal courts have fashioned a federal common law standard of veil-piercing in ERISA-related disputes and in actions to enforce ERISA judgments, in the belief that ERISA's overriding interest in protecting the inter-

ests of plan participants and beneficiaries justifies a more liberal approach than permitted by state law.

While there is no litmus test for disregarding the corporate form, and because federal courts must still consider a totality of circumstances, the NCCMP supports the federal common law standard because it enables the federal courts—when weighing competing considerations—to give due regard to ERISA's policy and purposes. As stated above and as discussed further below in Section I, C., this more liberal approach is particularly important to multiemployer plans because of their inability to screen potential contributing employers for credit-worthiness or to terminate their relationship with undercapitalized, insolvent, mismanaged, or fictitious corporations. Accordingly, federal courts should not apply standards that have developed under state law with regard to ordinary classes of creditors who voluntarily assume the risk of their contractual undertakings.

2. Jurisdiction over veil-piercing claims to enforce an ERISA judgment

The federal district court had subject matter jurisdiction over Respondent's veil-piercing action under one of three alternative bases of federal jurisdiction. First, the Fourth Circuit properly held that the federal district court had ancillary jurisdiction over the veil-piercing claim, as the court's continuing jurisdiction over an individual who intentionally caused the judgment debtor to violate the court's prior order of judgment was necessary to vindicate the court's judgment and effectuate its decree. Second, as federal standards apply in determining whether to disregard the corporate form to impose liability for violations of a federal statute, the veil-piercing suit "arises under" federal law, and federal jurisdiction exists under 28 U.S.C. § 1331. And third, federal jurisdiction exists under ERISA Section 502(e)(1), as Respondent's veil-piercing suit alleged facts sufficient to state a claim under

ERISA Section 502(a)(3) for equitable relief to redress the ERISA-judgment debtor's violations of ERISA.

ARGUMENT

I. IN ACTIONS TO ENFORCE ERISA, THE TERMS OF EMPLOYEE BENEFIT PLANS, OR ERISA JUDGMENTS, FEDERAL COURTS SHOULD ADOPT A FEDERAL VEIL-PIERCING STANDARD TO DETERMINE WHETHER CORPORATE SEPARATENESS SHOULD BE DISREGARDED

A. A federal veil-piercing standard is appropriate for all stages of ERISA enforcement

In the case at bar, a corporate officer and shareholder held not to be liable as a fiduciary in an underlying ERISA action was subsequently held personally liable for a judgment rendered against a corporate fiduciary because the individual's postjudgment conduct resulted in the judgment's being uncollectible against the corporate debtor. To impose liability, the Fourth Circuit applied a federal common law veil-piercing standard to effectuate the prior judgment and, thus, to effectuate ERISA goals and policies.

The NCCMP endorses the Fourth Circuit's reasoning and submits that federal courts should apply a federal veil-piercing standard in circumstances wherein the existing facts warrant disregarding the corporate form in order to protect the interests of ERISA funds and their participants and beneficiaries. Federal courts should employ that federal standard whether the operative facts involve prejudgment or postjudgment conduct, and, in the postjudgment context, without regard to the nature of the ERISA judgment sought to be enforced; *i.e.*, a judgment based on breach of fiduciary duty under ERISA Sections 409(a) and 502(a)(2), or a judgment under ERISA Sections 515 and 502(a)(3) for violations of ERISA and/or the terms of the plan.

As a practical matter, the trustees of multiemployer plans will most often seek to invoke a federal veil-piercing standard in the course of prejudgment collection actions arising under Section 502(a)(3) of the statute, 29 U.S.C. § 1132(a)(3).[7] However, unless the Fourth Circuit's ruling is upheld, and a federal veil-piercing standard is made applicable to all stages of ERISA enforcement, the collection remedies available to multiemployer plans could well be substantially reduced,[8] thereby adversely

[7] In such actions, federal courts clearly have subject matter jurisdiction under ERISA §§ 515, 502(a)(1), and 502(e)(1); *i.e.*, the trustees' cause of action arises under §§ 515 and 502(a)(3), while federal common law determines whether the facts in a case militate in favor of disregarding the corporate entity to hold a person or entity other than the contributing employer liable for the company's failure to make contractually required contributions. In our view, the court would likewise have subject matter jurisdiction over an action to enforce against an individual owner a prior judgment for delinquent contributions rendered solely against the corporate debtor under § 502(a)(3), if that individual—like Peacock—engaged in postjudgment conduct rendering the judgment uncollectible. As will be discussed further in the next section of this brief, the federal court's jurisdiction could be premised on ERISA § 502(a)(3), because the postjudgment enforcement action would still be an action for equitable relief to redress violations of ERISA and/or the plan. Moreover, as federal common law would provide the substantive rules of decision, the court would also have federal question jurisdiction under 28 U.S.C. § 1331. Finally, as in the case at bar, the court would have ancillary jurisdiction to effectuate its own judgments. We believe the same principles should apply to a postjudgment enforcement action, such as the case at bar, where the original cause of action arose under § 502(a)(2).

[8] For example, if this Court were to find that traditional state-law principles should be applied to determine whether Peacock should be held liable for the judgment rendered below. As Petitioner urges, federal courts would be more likely to apply the stricter state standard not only in the context of postjudgment enforcement, but also in the context of prejudgment collection actions, unless the Court were also to provide guidelines as to when federal rather than state veil-piercing rules should apply to ERISA actions. As indicated above, however, we do not believe that there is any principled basis on which to make such a distinction; we therefore urge this Court to adopt a federal standard whenever it is necessary to pierce a corporate veil to enforce ERISA.

affecting those plans' ability to provide benefits to their participants and beneficiaries. Thus, selecting an appropriate standard is of crucial importance in enabling those plans to collect the contributions they need in order to remain financially viable.

B. A federal veil-piercing standard is appropriate where federal policies are at stake

The concept that a corporation is an entity separate and apart from the individuals who own and control it is a state-created legal fiction that was created "for the purposes of convenience and to subserve the ends of justice." *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Company*, 540 F.2d 681, 683 (4th Cir. 1976). However, courts will refuse to recognize the corporate entity if such recognition would extend the principles of incorporation beyond their legitimate purposes and would facilitate injustice and inequitable consequences. *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939); *see also Bangor Punta Operations v. Bangor & Aroostook Ry.*, 417 U.S. 703, 713 (1974). Accordingly, where justice, equity, and fairness dictate, courts disregard the corporate form and treat the corporation and its stockholders as one. *Taylor*, 306 U.S. at 322; *Keffer v. H.K. Porter Co., Inc.*, 872 F.2d 60 (4th Cir. 1989); *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383 (2d Cir. 1989); *Town of Brookline v. Gorsuch*, 677 F.2d 215, 221 (1st Cir. 1981); *DeWitt*, 540 F.2d at 683; *Connors v. Princeton Coal Group*, 770 F.Supp. 1132 (S.D.W. Va. 1991).

Beyond these general principles (which apply both to federal and state courts), it is well-established by Supreme Court precedent that federal legislative policies affect the standard to be applied in piercing the corporate veil. As a general rule, federal courts will apply a more liberal federal standard where federal interests are involved,

where a lawsuit arises under federal substantive law, or where a federal judgment is sought to be enforced.

In *Anderson v. Abbott*, 321 U.S. 349, 365 (1944), for example, this Court characterized piercing the corporate veil of a bank-holding company to be an issue of federal law and stated that the corporate shield, as a creature of state law, could not be asserted to defeat the federal policies of the national banking law. The Court noted that while states are free to treat shareholders' liability as they wish, in the absence of a conflicting federal incorporation statute, "no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy concerning national banks which Congress has announced." *Abbott*, 321 U.S. at 365. And, as the Fourth Circuit correctly observed in *Peacock* "the general rule adopted in the federal cases is that 'a corporate entity may be disregarded in the interests of public convenience, fairness and equity,' (citation omitted). In applying this rule, federal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form [citations omitted], an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine. . . ." *Peacock*, 39 F.3d at 503-04 (quoting *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981)).

In cases in which ERISA is implicated, the overriding federal policy at stake is the policy of protecting and preserving the solvency of ERISA-regulated employee benefit plans. Because these benefits are crucial to the welfare of millions of Americans, and to this country's ability to provide for and protect its citizens, a majority of federal courts that are asked to pierce corporate veils adopt the more liberal federal veil-piercing standard, fashioning federal common law to effectuate ERISA's goals. *See U.S. v. Van Diviner*, 822 F.2d 960, 965 (10th Cir. 1987) (where federal interests are implicated, federal common law defines the rights and liabilities of the parties); *IAM*

IAM National Pension Fund v. Wakefield Industries, 612 F. Supp. 643 (D.D.C. 1985) (in determining whether an individual should be liable for company's withdrawal liability, court is guided by federal common law of veil-piercing). *See also Alman v. Danin*, 801 F.2d 1 (1st Cir. 1986) (as ERISA does not attach too great weight to corporate form, allowing shareholders of a marginal corporation to invoke a corporate shield in order to avoid financial obligations to employee benefit plans would be inequitable and is precisely the type of conduct Congress wanted to prevent).[9] These cases are, of course, consistent with this Court's teaching in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), in which the Court specifically stated that when Congress enacted ERISA, it intended federal courts to fashion a federal common law of rights and obligations under ERISA to carry out the statute's goals and policies.

In fashioning a federal common law standard for veil-piercing, federal courts do not abandon the common law totality-of-circumstances test applied in state courts, nor do they ignore the numerous factors that state courts consider in their veil-piercing analyses. Indeed, federal common law too requires that courts examine certain factors to determine whether a corporate form was properly maintained. In doing so, federal courts may even look to state law standards for guidance. *United Electrical Workers v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1092-93 (1st Cir. 1992);[10] *Laborers Clean-Up Contract Admin.*

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[9] In *Alman*, as in the case at bar, the company against which the district court entered an ERISA judgment for delinquent contributions was defunct and assetless; therefore, plaintiffs filed a second action against a related company and two shareholders, seeking to collect the first judgment under a single-enterprise and veil-piercing theory.

[10] In *United Electrical Workers*, the First Circuit noted that "[u]nder Massachusetts common law, disregarding the corporate form is permissible only in rare situations." However, the court found that it would "serve no useful purpose to explore the in-

Trust Fund v. Uriarte Clean-Up Serv. Inc., 736 F.2d 516 (9th Cir. 1984). However, as the Fourth Circuit explained in the case at bar, although there is no "litmus test" in the federal courts for determining when to disregard the corporate form, federal courts, in making that determination, must give substantial consideration to ERISA's goals and policies and its limited deference to the corporate form. Federal courts must also seriously consider the inequitable results that would occur if they were to treat corporate acts that undermine the financial soundness of employee benefit plans (e.g., through the evasion of legal obligations) as the acts of the corporation alone, where a unity of interest and ownership indicates that the separate personalities of the corporation and the individual shareholders no longer exist. *Peacock*, 39 F.3d at 503-04.[11] Thus, because the federal veil-piercing standard is sufficiently flexible to permit policy considerations to be taken so seriously into account, the NCCMP submits that this standard is appropriate to ERISA's enforcement scheme as a whole.

C. A federal veil-piercing standard accommodates the economic realities in which multiemployer plans operate

Multiemployer employee benefit plans are plans created by parties to collective bargaining agreements for the purpose of providing health, retirement, and related benefits to workers and their families. These plans are primarily self-funded through the ongoing contributions of several, hundreds, or even thousands of employers in one or more industries involving participants working or living in several or many states. The contributions are pooled for investment to provide benefits to all participants and beneficiaries of the plan.

A very large number of employers who contribute to multiemployer plans are close corporations. Many of these companies operate with a substantial degree of indifference to corporate formalities. However, because multiemployer plans are third-party beneficiaries of collective bargaining agreements between unions and employers, they generally cannot (and do not) screen prospective contributing employers for reliability or creditworthiness. Moreover, there is little (if any) opportunity for plans to obtain information as to how the employer has structured its business—either before or after it becomes a contributing employer. And, even if such opportunity did exist, multiemployer plans often have no legal right to terminate their relationship with marginal employers, as would a trade creditor who refuses further credit or orders. Thus, multiemployer benefit plans are not like creditors who voluntarily assume the risk of dealing with undercapitalized, insolvent, mismanaged, or fictitious corporations. To balance out this lack of bargaining power, multiemployer benefit plans need, and indeed deserve, greater latitude on their veil-piercing claims than might be accorded to trade creditors who contract directly with debtor corporations, for those creditors are in a better position to gain access to information about a corporation and to assess and/or assume the risks of their undertakings. Accordingly, federal courts should not apply to employee benefit plans standards that have developed under state law with regard to ordinary classes of creditors.[12]

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terstices of the state law standard [as] this is, after all, a federal question case—and in federal question cases courts are wary of allowing the corporate form to stymie legislative policies." The court added that the rationale for applying a less rigorous federal standard, *i.e.*, for "encouraging a modicum of corporate disregard in ERISA cases," is grounded on "congressional intent" to protect the interests of employee benefit plan participants and their beneficiaries." 960 F.2d at 1091-1092.

[11] Given these concerns, the Fourth Circuit does not require a showing of "plain fraud" to pierce the corporate veil. *Peacock*, 39 F.3d at 504, n.16.

[12] In a somewhat different (though not unrelated context), this Court has previously recognized that employee benefit plans are uniquely situated third-party beneficiaries of collective bargaining

Finally, the NCCMP respectfully represents that by urging this Court to recognize and adopt a relaxed standard of veil-piercing under ERISA, we do not suggest that courts disregard the corporate entity lightly. Rather, we urge this Court to consider that because so much is at stake nationally with respect to the proper funding of employee benefit plans, it is crucial to the well-being of those plans that federal courts balance the degree of impropriety required to pierce a corporate veil with the national goals and policies to be achieved under ERISA. Hence, the NCCMP urges this Court to affirm the federal veil-piercing standard adopted by the Fourth Circuit in the case at bar.

II. FEDERAL JURISDICTION OVER CORPORATE VEIL-PIERCING CLAIMS TO COLLECT ERISA JUDGMENTS IS CONSISTENT WITH ERISA'S BROAD GRANT OF FEDERAL JURISDICTION TO ENFORCE ERISA RIGHTS AND OBLIGATIONS, AND IS SUPPORTED BY APPLICABLE LAW

A. Three distinct bases of federal jurisdiction exist where federal courts are asked to enforce a prior ERISA judgment by applying a federal common law veil-piercing standard

To recapitulate the facts and procedural posture of this case, Respondent (Thomas), on behalf of a class of participants seeking entitlement to certain retirement benefits, succesfully prosecuted a breach of fiduciary duty claim against a corporation (Tru-Tech), which was held responsible for underfunding the plan, and a judgment was entered in the amount of 187,000. The district

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agreements. The Court has therefore held that defenses which could be raised against the Union as a contracting party can not be raised against trust funds whose trustees sue based on the same contract. *See Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *Robbins v. Schneider Moving & Storage Co.*, 466 U.S. 364 (1984). Similar principles should apply in adopting a federal veil-piercing standard.

court's jurisdiction over plaintiff's breach of fiduciary duty claim was predicated on ERISA Section 502(e)(1), 29 U.S.C. § 1132(e)(1) as the cause of action was brought under ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2). After the judgment was entered, the company's principal shareholder and board chairman (Peacock), who was held not to be a co-fiduciary in the initial action, engaged in a strategy to dissipate the assets of the corporate debtor, resulting in the ERISA judgment's being uncollectible. Therefore, Thomas filed a second federal court action to collect the judgment, urging the district court to pierce Tru-Tech's corporate veil. The district court assumed jurisdiction in the second action and, applying a federal common law standard as being applicable to ERISA, found Peacock liable for the judgment as a result of his postjudgment conduct.

Peacock argued that Thomas's "suit [was] one merely to collect an outstanding judgment and that, because ERISA [was] not thereby implicated, the district court lacked subject matter jurisdiction over the case." 39 F.3d at 499. Arguing that once *Thomas* won its judgment against Tru-Tech it became a judgment creditor like any other, Peacock reasoned that *Thomas* should seek relief in the state courts. Rejecting this argument, the Fourth Circuit concluded that Thomas's attempt to pierce the corporate veil to enforce a prior ERISA judgment was properly entertained by the district court under its ancillary jurisdiction.

Although the NCCMP believes the Fourth Circuit's ruling is consistent with this Court's precedents, and urges affirmance, we believe that alternate bases of federal jurisdiction also exist. As we shall show, where an individual having power to influence the disposition of corporate assets flouts ERISA by rendering an ERISA judgment against that corporation uncollectible, and a subsequent action is brought to enforce the judgment against that individual on a federal veil-piercing theory, federal subject matter jurisdiction necessarily exists under both 28 U.S.C.

§ 1331 and under ERISA Section 502(e)(1). In our view, these bases of federal jurisdiction exist regardless of the nature of the prior ERISA judgment. Moreover, as federal law supplies the exclusive rules of decision, there is no place for state courts in this scheme.

B. The compelling national interests legislated in ERISA justify the Fourth Circuit's finding that the federal district court has ancillary jurisdiction over postjudgment efforts to pierce the corporate veil of an ERISA-judgment debtor, as the retention of federal jurisdiction to impose liability in such circumstances is necessary to vindicate the federal courts' authority and effectuate their decrees

The Fourth Circuit's finding that the federal district court had ancillary jurisdiction over Respondent's attempt to pierce the corporate veil to impose liability on Peacock is fully consistent with this Court's recent precedent. In *Kokkonen v. Guardian Life Ins. Co. of America*, 114 S. Ct. 1673 (1994), the Court articulated the "two separate, though sometimes related" circumstances under which it has asserted ancillary jurisdiction, as follows: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable the court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 1676 (citations omitted). Assuming that the former basis cannot apply in cases such as the one at bar, in which the imposition of liability arises from facts occurring subsequent to a prior judgment, the latter basis plainly supports the exercise of ancillary jurisdiction under facts, such as those at issue, where liability is sought to be imposed on an individual who deliberately causes a judgment debtor to violate the court's prior judgment ordering payment to the successful plaintiff.

The facts in *Kokkonen*, of course, were very different from the facts and concerns at bar, and are therefore particularly useful for contrast. There, the original action, a suit for breach of an agency agreement which had been removed from state to federal court on the basis of diversity jurisdiction, was settled and the action dismissed with prejudice. Although the settlement agreement served as consideration for the dismissal, it was not incorporated into the dismisal order or otherwise committed to the federal court's supervisory authority. Viewing the subsequent alleged breach of the settlement agreement as a breach of contract action having no relationship to the federal court other than the fact that it resulted in the dismissal of the earlier federal suit, this Court found that there was no basis for ancillary jurisdiction given the remoteness of federal concerns to the subject matter of the second dispute.

In contrast, the underlying action in the case at bar arose under a federal statute conferring exclusive jurisdiction on the federal court. Moreover, in the subsequent action to enforce the federal court judgment, federal law supplied the exclusive principles for imposing liability. Finally, unlike the facts in *Kokkonen*, the record in this case plainly reveals that Peacock engaged in a deliberate strategy to cause the judgment debtor to violate the district court's order of judgment. *See* District Court's Findings of Fact Reproduced in Appendix to Petition for Certiorari, at 41a ("In contemplation of the *Thomas* judgment and following its entry, Peacock directed the management of Tru-Tech's affairs to defeat the collection of the *Thomas* judgment by siphoning off the assets of the corporation to certain favored creditors owned or controlled by Peacock."); 42a ("These assets of Tru-Tech were siphoned off by Peacock pursuant to a corporate strategy developed by him. It was the specific intent and purpose of this strategy to siphon off these assets to favored creditors owned or controlled by Peacock *and to defeat collection of the Thomas judgment*. . . ." In his efforts to siphon off the assets of Tru-Tech to favored creditors owned or controlled by Peacock, it was the

specific intent of Peacock to defraud the former employees of Tru-Tech who were beneficiaries of the Pension Plan and *to defeat their legitimate attempt to collect a lawful judgment*." (Emphasis added.) These finding of fact alone place this case squarely within the second basis for ancillary jurisdiction set forth in *Kokkonen*.

Moreover, in *Owen Equipment & Erection Company v. Kroger*, 437 U.S. 365 (1978) this Court's discussion of the factors relevant to a federal court's exercise of ancillary jurisdiction also supports federal court jurisdiction. Although *Owen* was also a diversity case in which the Court found ancillary jurisdiction lacking, Justice Stewart, writing for the majority, explained that "there must be an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim, in order to determine whether 'Congress in [that statute] has . . . expressly or by implication negated' the exercise of jurisdiction over the particular nonfederal claim." *Id.* at 373 (quoting *Aldinger v. Howard*, 427 U.S. 1, 18 (1976)).

Assuming, *arguendo*, that Thomas's veil-piercing claim does not in and of itself give rise to an independent basis of federal jurisdiction, the character of the initial claim against Tru-Tech, as well as ERISA's policy establishing employee benefits law as an area of exclusive federal concern, are of prime relevance in determining the legitimacy of the district court's continuing jurisdiction over postjudgment efforts to pierce the corporate veil. Because the initial claim against Tru-Tech was brought under ERISA Section 502(a)(2), for breach of fiduciary duty, over which federal courts have *exclusive jurisdiction* under ERISA Section 502(e)(1), the district court's authority to vindicate its judgment against an individual who deliberately caused the judgment debtor to violate the court's order cannot be more clear. Accordingly, the Fourth Circuit's affirmance of the district court's finding of ancillary jurisdiction was fully consistent with this Court's precedent and with ERISA's broad grant of federal jurisdiction over ERISA claims, and there is no logical reason why such veil-piercing actions should be decided by a state court.

C. The district court had subject matter jurisdiction over Respondent's claim against Peacock under 28 U.S.C. § 1331, as suits to pierce the corporate veil to collect federal judgments "arise under" federal common law

As discussed above, federal courts throughout the United States have held that a federal common law standard should be applied in piercing corporate veils to impose liability for ERISA judgments, and in other ERISA-related disputes. Because the resolution of this case turns exclusively on a question of federal substantive law, Respondent's veil-piercing claim "arises under" federal law, and therefore, the federal district court had subject matter jurisdiction under 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

In *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972), this Court held that "§ 1331 jurisdiction will support claims founded upon federal common law as well as those of statutory origin." *See also National Farmer's Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) ("Federal common-law as articulated in rules that are fashioned by court decisions are 'laws' as that term is used in § 1331."). Likewise, in *Franchise Tax Board v. Laborers' Vacation Trust*, 463 U.S. 1 (1983), the Court confirmed that the "arising under" jurisdiction of federal district courts extends beyond those classes of cases in which a federal statute creates the cause of action, to include the general vindication of rights that "necessarily turn[] on some construction of federal law." *Id.* at 9. Summarizing its own interpretations "over many years," the Court characterized as falling within Congress's grant of federal district court juris-

diction, "those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action *or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.*" *Id.* at 27-8. (Emphasis added.)

Although we believe that ERISA Section 502(a)(3) is sufficiently broad to encompass a cause of action for equitable relief in the form of piercing the corporate veil to enforce an ERISA judgment, *infra*, the absence of such a cause of action under ERISA itself would not deprive federal courts of jurisdiction under 28 U.S.C. § 1331 for two distinct reasons.

First, as noted above, this Court's precedents make clear that jurisdiction under § 1331 is not dependent on the existence of a cause of action under another federal statute, but exists wherever resolution of a lawsuit turns entirely on a question of federal common law. Moreover, as the Fourth Circuit found, "an attempt to pierce the corporate veil is not itself a cause of action but rather is a means of imposing liability on an underlying cause of action . . . ." *Peacock*, 39 F.3d at 499, quoting 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations*, § 41, at 603 (perm. ed. rev. vol. 1990). Because "an attempt to pierce the corporate veil is necessarily subsidiary to some primary cause of action," *id.*, the postjudgment veil-piercing claim need not state an independent cause of action under ERISA, as complete relief may be afforded by federal common law.

Second, in suing Peacock to pierce the corporate veil, Respondent was not attempting to hold Peacock liable for his own ERISA violations, but rather, was seeking to hold Peacock liable, under federal common law, to redress Tru-Tech's ERISA violations. Therefore, because Respondent's veil-piercing claim does not allege that Peacock violated ERISA, it need not fall within one of ERISA's "six carefully integrated civil enforcement provisions." *See*

Mertens v. Hewitt Associates, 113 S. Ct. 2063 (1993); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). In both *Mertens* and *Russell*, plaintiffs alleged that defendants violated ERISA, but the Court ruled against plaintiffs in both cases on the grounds that the relief sought was not available under ERISA Section 502.[13] However, by claiming that a defendant such as Peacock breached a federal common law duty to refrain from rendering worthless a federal court judgment, as opposed to a duty imposed by ERISA, the federal common law claim need not fall within ERISA's "carefully reticulated" enforcement scheme. Instead, although ERISA affects the standard to be applied in determining liability, the veil-piercing claim arises under federal common law, and federal jurisdiction therefore exists under 28 U.S.C. § 1331.

Finally, as discussed earlier, the equitable principle of disregarding the corporate form to advance the policies of federal legislation is not unique to ERISA, but repre-

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[13] *Mertens* and *Russell* are readily distinguishable from both the case at bar as well as from analogous actions by multiemployer plan trustees seeking to enforce ERISA judgments for delinquent contributions against individuals on a federal common law veil-piercing theory. In *Mertens*, this Court held that ERISA § 502(a)(3) does not authorize suits for money damages against nonfiduciaries for knowingly participating in a fiduciary's breach of fiduciary duty, as § 502(a)(3) contemplates only "equitable relief," whereas direct and consequential damages constitute "legal relief" and are available only in actions under ERISA § 502(a)(2) against fiduciaries. In *Russell*, the Court held that a participant could not sue under ERISA § 502(a)(2) to recover personally compensatory or punitive damages resulting from a plan administrator's belated processing of a claim, as any recovery arising from a breach of fiduciary duty claim inures solely to the benefit of the plan. The Court also found that ERISA's civil enforcement scheme does not contemplate punitive damages. In postjudgment federal veil-piercing actions of the type at bar, ERISA causes of action will already have been pursued to final judgment against a proper defendant; federal common law merely permits those judgments to be enforced against a nonjudgment debtor where equity and justice require the corporate entity to be disregarded.

sents a traditional remedy provided by federal courts. *Anderson v. Abbott*, 321 U.S. 349 (1944); *First National Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983). Therefore, even assuming, *arguendo*, that Respondent's veil-piercing suit fails to state a claim under ERISA Section 502(a), the exclusivity of ERISA's civil enforcement scheme cannot be interpreted to displace equitable remedies traditionally recognized by the courts of the United States.

D. Suits to pierce the corporate veil to enforce a prior ERISA judgment state a cause of action under ERISA Section 502(a)(3)

Section 502(a)(3) of ERISA provides that a civil action may be brought "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) *to obtain other appropriate equitable relief* (i) *to redress such violations* or (ii) to enforce any provisions of this title or the terms of the plan." (Emphasis added.)

This provision is very broad. While it limits the classes of persons who are authorized to seek redress of ERISA violations, and provides only for equitable relief, it does not limit either the type of ERISA violations for which equitable relief is available or the persons against whom (or which) an action can be brought. Accordingly, the NCCMP submits that Respondent's veil-piercing suit falls literally within the above provision, as would a suit brought by multiemployer plan trustees to enforce a judgment rendered in a collection action.[14] Therefore, federal

[14] Although Respondent's Complaint did not allege a cause of action under § 502(a)(3), we believe Thomas's suit to pierce the corporate veil under ERISA stated an ERISA claim under the liberal notice pleading rule set forth in *Conley v. Gibson*, 355 U.S. 41 (1957).

courts should have exclusive jurisdiction under ERISA Section 502(e)(1).

We parse the provisions as follows. In the context of a postjudgment enforcement action, a federal court will already have determined that ERISA or "the terms of the plan" have been "violated" and will have rendered a judgment against the person(s) answerable for the harm—either under Section 502(a)(2) or Section 502(a)(3). Where an individual having power over a corporate judgment debtor deliberately flouts that judgment and makes it uncollectible, a participant, beneficiary, or fiduciary may seek relief, under Section 502(a)(3), to "redress" that subsequent "violation." Therefore, the only question that requires further analysis is whether veil-piercing constitutes "other appropriate equitable relief."

Although the Fourth Circuit did not consider veil-piercing in the context of Section 502(a)(3), it stated quite clearly that "the doctrine of piercing the corporate veil is an equitable one," citing 1 *Fletcher, supra.* 39 F.3d at 499-500. Distinguishing *Mertens, supra,* the Court of Appeals stated, further, that "[t]he current attempt by plaintiffs is not, however, . . . an independent action for monetary damages against a nonfiduciary, but an *equitable attempt* to satisfy a previous judgment entered against a fiduciary [e.g., a corporate judgment debtor]."[15] *Id.* at

[15] This distinction cannot be overemphasized, and the Fourth Circuit correctly rejected Peacock's suggestion that Thomas's second action constituted a second bite at the apple or an attempt to circumvent *Mertens*. First, as noted earlier. *Mertens* holds only that § 502(a)(3) does not authorize suits for *money damages* against nonfiduciaries who assist fiduciaries in breaching their fiduciary obligations; *Mertens* does not foreclose suits for *equitable relief under* § 502(a)(3) against nonfiduciaries to redress such violations, let alone to redress other and different violations of ERISA. Second, Thomas's second action was not predicated on Peacock's violation *of any* fiduciary duty under ERISA, but on Peacock's deliberate attempt to render the corporate debtor judgment-proof.

502. The Fourth Circuit's characterization accords with this Court's recognition that veil-piercing to collect judgments based on federal law is a traditional equitable remedy. *See e.g., Taylor v. Standard Gas,* 306 U.S. at 322.

In sum, ERISA Section 502(a)(3) requires two elements, a violation of ERISA and a request for equitable relief. A violation of ERISA can result from the violation of a specific statutory provision or from a violation of the federal common law of ERISA.[16] Consequently, because Peacock violated the federal common-law of ERISA by causing an ERISA judgment to be rendered uncollectible, and because veil-piercing is an equitable remedy, both requirements of Section 502(a)(3) have been satisfied in this case.

[16] In fact, this Court, in *Franchise Tax Board,* stated that, "federal jurisdiction over suits under § 502 is exclusive, and they are governed entirely by federal common law." *Franchise Tax Board,* 463 U.S. at 19-20, n.20.

CONCLUSION

For the reasons stated above, the NCCMP respectfully urges this Court to affirm the decision of the Fourth Circuit, to hold that a federal veil-piercing standard should be applied by the federal courts whenever it is necessary to disregard the corporate form in the context of an ERISA-related dispute, and to hold that federal courts have exclusive jurisdiction over suits to enforce ERISA judgments where liability is predicated on a veil-piercing theory.

Respectfully submitted.

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